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April 21, 1991

BENTHAMITE UTILITARIANISM AND LAW REFORM
IN CANADA: A CRIMINAL
LAW PERSPECTIVE

- Thesis submitted in partial completion of the
course requirements for the degree
of Master of Laws -

Donna G. White



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ISBN 0-315-68022-9

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UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

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But I have planted the tree of utility. I
have planted it deep, and spread
it wide. --- Jeremy Bentham

INTRODUCTION

Utilitarianism, as reflected in the scholarship of Jeremy Bentham, is a theory of evaluation which assesses the overall "utility" of an act, whether it be an act of an individual or of a government, by reference to a standard which requires everyone to act in furtherance of the greatest good for the greatest number. Utilitarian theory, at its very core, is based on the premise that the value of any action should be judged by its effect in promoting happiness - the surplus of pleasure over pain. An action, whether of an individual or of a legislature, is considered to be in harmony with the principle of utility if the total amount of "pleasure" caused to the persons affected by the action outweighs the total amount of "pain".

As will be seen from the discussion following, Jeremy Bentham used this principle of utility to provide a framework within which to criticize existing laws and to generate proposals for law reform. The primary object of this Paper is to show that, notwithstanding Jeremy Bentham's reputation as both the father of utilitarianism and one of the first great law reformers, utilitarian theory does not constitute an appropriate model for generating proposals for criminal law reform in modern Canadian society, particularly given that we

have now entrenched a Charter of Rights and Freedoms¹ in our Constitution.

As a preliminary step, part one of this Paper will explore the theoretical underpinnings of Benthamite utilitarianism and canvass the major criticisms of utilitarian theory which manifest themselves in legal and philosophical literature. Part one will also examine the clash between utility theory and the values reflected in the Charter, the nature of the balancing exercise undertaken by the courts in assessing whether an individual's charter rights have been violated by laws or governmental action and, if so, whether such violation is justified in the constitutional context.

Part two will address the extent to which utilitarian theory has been used by the Law Reform Commission of Canada. It will be seen that the Commission, in criticizing existing laws and formulating recommendations for the reform of such laws, has in a number of contexts, looked to utilitarianism for guidance. Part two will also examine a number of recommendations of the Law Reform Commission in the criminal law field which are based on an assessment of the underlying utility of alternative courses of action or which reflect strong utilitarian underpinnings. It will be seen from an examination of these proposals that: (1) the Commission's

¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, which is Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 (hereinafter "the Charter").

recommendations reflect many of the shortcomings of utilitarian theory discussed in part one of this Paper; and (2) that in certain contexts the Commission has found it necessary, in order to arrive at an appropriate and defensible recommendation, to depart from pure utilitarian theory and to take account of other considerations which strict utilitarians would normally consider irrelevant. The process exhibited by the Commission in formulating the proposals reviewed in part two illustrates that pure utility theory does not, and indeed cannot, serve as an appropriate framework within which to generate recommendations for reform of substantive criminal law in contemporary Canadian society.

One of the major problems with utility theory which will be discussed in a number of contexts throughout the Paper is the fact that its adherence to the majoritarian principle that the sole object of laws should be the furtherance of the greatest good for the greatest number is completely at odds with the recognition of the sanctity of the rights of the individual. This majoritarian focus of utilitarianism clashes with the provisions of the Charter which serve to protect individual liberties and highlights the inappropriateness of the utilitarian model as a model for criminal law reform in the Canadian context.

This above observation leads directly into the question which is addressed in the concluding chapter of this Paper-

whether utilitarianism can ever serve as an appropriate model for law reform in the criminal law field, and if so, in what sorts of situations? The answer to this question, it is submitted, is that utility theory does provide a useful framework for the law reform exercise in one limited situation - where a balancing of all factors relevant to a determination of whether a given law should be retained or repealed are equal and where there are no negative constitutional implications. In such cases, it will be appropriate to resort to an assessment of the net utility of the options under consideration in order to choose between such options.

PART ONE: THE FOUNDATIONS AND DEFICIENCIES
OF UTILITARIANISM

Utilitarianism is a stream of philosophical thought which has influenced a vast array of disciplines. Originally formulated as "a guide to social polity in the revision of existing institutions",² utilitarian philosophy has been transposed and applied to diverse spheres. Jeremy Bentham's brand of utilitarianism has formed the basis for twentieth-century welfare economics,³ underlies a school of political theory⁴ and represents the cornerstone of a complete system of moral ethics.⁵ In addition, in the field of law reform, Benthamite utilitarianism has "laid the foundations for a new

2 N. Rescher, Distributive Justice (1966), at p. 11.

3 Bentham's utilitarian theory was adopted and transposed into the economic sphere by those such as Adam Smith and Thomas Malthus. For some additional background see F. Hahn, "On Some Difficulties of the Utilitarian Economist", in Sen and Williams (eds.), Utilitarianism and Beyond (1982), at pp. 187-198. See also, R. Posner, "Utilitarianism, Economics and Legal Theory" (1979), 8 J. of Legal Studies 103 and Ernest Weinrib, "Utilitarianism, Economics and Legal Theory" (1980), 30 Univ. of Toronto Law J. 307.

4 Benthamite utilitarianism also formed the philosophical basis for the doctrine of "laissez-faire" which was the dominant political ideal for the greater part of the nineteenth century.

5 A leading work in this area is Sidgwick, The Methods of Ethics (7th ed., 1907). See also, Jan Narveson, Morality and Utility (1967) and Anthony Quinton, Utilitarian Ethics (1973).

school of jurisprudence that infused into the study of law the scientific principles of the Age of Reason."⁶

Bentham was a serious scholar and a very prolific writer. His published expositions fill eleven volumes and more of his writings have been discovered in recent years but have not yet been put to print.⁷ Bentham's views on the nature of sovereignty and underlying political theory are set out in A Fragment on Government.⁸ In terms of utilitarian philosophy, Bentham's most influential work is his Introduction to the Principles of Morals and Legislation⁹ which was written four years later but not published until 1789. It is in his Introduction that the fundamental underpinnings of Bentham's utilitarian theory are revealed and explained.

⁶ Peter J. King, Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century (1986), at p.i.

⁷ Bentham's major writings include Comment on the Commentaries and A Fragment on Government, An Introduction to the Principles of Morals and Legislation, Limits of Jurisprudence Defined, Panopticon, Book of Fallacies, Rationale of Judicial Evidence, Of Laws in General, Deontology, The Constitutional Code, Chrestomathia. In addition, six volumes of his correspondence have been published by Athlone Press. For a collection of Bentham's works see John Bowring (ed.), Works of Jeremy Bentham (11 vols.) (Edinburgh, 1838-1843). For a complete outline of Bentham's works see, Ross Harrison, Bentham (1983) at pp. ix to xxiv.

⁸ (1776)

⁹ References to this work will be from the edition by Burns and Hart (London: The Athlone Press, 1970) and will hereinafter be cited as Introduction.

The purpose of this part is to trace the origins and development of utilitarian thought and to provide a basic outline of the nucleus of Jeremy Bentham's perception of utilitarianism as a "general theory of evaluation".¹⁰ In addition, this part will explore Bentham's use of utility theory to provide a framework within which to critically examine the existing legal order and for generating proposals for legal reform.¹¹ This chapter will also survey the deficiencies of utilitarian theory in serving as a model for law reform and expose the inapplicability of the majoritarian-based utility model in a country which, through the enactment of a Charter of Rights, has committed itself to the unwavering protection of the fundamental rights of individuals.

¹⁰ See D. Lyons, In the Interest of the Governed (1973), at p. 1. Lyons refers to Bentham's impact on philosophy as being his development of "utilitarianism as a general theory of evaluation" which Bentham applied with "characteristic consistency and single-mindedness".

¹¹ For some background material on Bentham's efforts and successes as a law reformer see, Mary Mack, Jeremy Bentham: An Odyssey of Ideas 1748-1792 (1962), C. Phillipson, Three Criminal Law Reformers: Beccaria, Bentham and Romilly (1970) and G. Keeton and G. Schwarzenberger (eds.), Jeremy Bentham and the Law (1948).

CHAPTER ONE: WHAT IS UTILITARIANISM?

(a) The Enlightenment - A Reaction to Natural Law Theory

Notwithstanding its influence on other disciplines, utilitarianism originated as a variety of legal positivism.¹² Positivism developed in the eighteenth century out of the movement to discredit or dethrone natural law theory.¹³ Adherents to the classical theory of natural law believe that there exists a pre-ordained law or body of laws of nature which govern the entire ambit of worldly experience ranging from the force of gravity to complex human relationships. The ancient Greeks thought that laws were derived from some supreme supernatural force and that human laws were simply reflections of this all-controlling power of fate.¹⁴ Aristotle recognized human capacity for reason as an expression of the laws of nature and

12 For some background on the origins and history of the utilitarian movement in England see, John Plamenatz, The English Utilitarians (1966); Sir Leslie Stephen, English Utilitarians (3 vols.)(1900); Ernest Albee, A History of English Utilitarianism (1902); Elie Halevy, The Growth of Philosophic Radicalism (1934).

13 For an overview of the basic tenets of positivism see Lord Lloyd of Hampstead, Introduction to Jurisprudence (3rd ed.) (1972) and J. Finch, Introduction to Legal Theory (1974). Also of interest is H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958), 71 Harv. Law Rev. 593.

14 As a matter of interest see Robin Barrow, Plato, Utilitarianism and Education (1975).

hypothesized that man lives in accord with principles of natural law if he is governed by his own reason. As Paton explains:

"The universe itself was governed by a reason similar to that which dwelt in man, and hence he who based his life on a rule of reason could face the world with confidence; for whether he understood or not the turn of fortune's wheel, a universe based on reason could not be hostile to him." 15

Later, in the Middle Ages, religious philosophers such as Thomas Aquinas refined natural law theory slightly by suggesting that the law was an expression of some higher will of divine origin, which was revealed at least partly in scripture, and was manifested in the moral nature of mankind. However, in the seventeenth and eighteenth centuries, natural law theory became secularized, focusing on the nature of man as a rational being. Philosophers such as Grotius¹⁶ and Hobbes¹⁷ expounded the view that law resulted from man's innate desire to live with others in societal groups and that certain minimum rules in the form of laws, necessary to make peaceful co-existence possible, were natural by-products of man's social nature. In Leviathan Hobbes suggests that:

15 G.W. Paton, A Text-Book of Jurisprudence (2nd ed.)(1951), at p. 80.

16 Grotius' major work published in 1625 is entitled De Iure Belli ac Pacis.

17 Thomas Hobbes' major work is entitled Leviathan. Hobbes' writings have been collected and edited by Sir William Molesworth, Hobbes (1839). See also, Hobbes' Body, Man and Citizen (R. Peters, ed.)(1962).

"A law of nature is a general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same ... "18

Notwithstanding the differences in opinion as to the source of law, all natural law theorists had one thing in common - they adhered to the underlying premise that "what exists ought naturally to be". In Bentham's time, natural law theory was used as a means of explaining why laws and legal institutions existed in their respective forms. It adapted well to the purpose of justifying the continued existence of laws and institutions. However, the maxim "what is, ought naturally to be" did not very readily lead one to critically examine the existing legal order from a reformist perspective. Classical natural law theory, by reason of its underlying premises, is considered by some to be conservative and simplistic in the sense that "its practical function [is] to provide a justification of existing institutions by a bare assertion of their absolute sanctity."¹⁹

One of the leading natural law theorists of Bentham's time was Blackstone.²⁰ In fact, Bentham was, in his early years at Oxford, a student of Blackstone's. Blackstone, like many of his

18 Chapter xiv.

19 Finch, Introduction to Legal Theory (1974), at p. 23.

20 For a useful summary of Blackstone's career and writings see W.J.V. Windeyer, Lectures on Legal History (2nd ed.) (1957), at pp. 243-250.

contemporaries who adhered to the theory of natural law, regarded the English system of common law with reverence and patriotic pride. According to Blackstone's view of law as a product of natural forces, a law or institution would not be subject to criticism unless it contravened the laws of nature.²¹

Blackstone's Commentaries,²² which are to be credited as representing a comprehensive and authoritative survey of English law, were a direct product of an epoch of British history characterized by adulation and praise for the English constitutional monarchy. Blackstone and other natural lawyers writing in the same time period tended to view the English system of common law uncritically, preferring to extol the virtues of English law and institutions in their writings.²³ For example,

²¹ For a brief discussion of Blackstone's view of the worthiness of law see J. Finch, Introduction to Legal Theory, supra note 19, at pp. 39-40. Modern natural law theory as espoused by writers such as Finnis and Strauss does not adhere to Blackstone's notion that the legal order is derived from the laws of nature. See John Finnis, Natural Law and Natural Rights (1980) and Leo Strauss, Natural Rights and History (1953). Natural law theory has been updated, largely in reaction to positivist legal thought. The change in natural law theory has been explained by Finch as follows: "... many modern advocates of natural law tend to stray away from the insistence of the binding quality of natural law and the consequently inferior and derivative quality of positive laws, and emphasize the fact that without reason and conscience, things just would not continue well and smoothly. The erstwhile grandiose claims of natural law to the general governance of human legal problems have been reduced to the assertion that man must legislate and administer his laws according to reason and conscience if his legal system is to be worthwhile." Supra note 19, at p. 28.

²² Commentaries on the Laws of England, (1765).

²³ Dicey called the late eighteenth century the 'era of Blackstonian optimism', cited in Windeyer, Lectures on Legal History, supra note 20, at p. 246.

Sir Matthew Hale, a scholar who greatly influenced Blackstone, described the English system of common law in this way:

"It is not only a very just and excellent law in itself, but it is singularly accommodated to the frame of the English government and to the disposition of the English nation."²⁴

With the revolution of thought in science, mathematics and social philosophy that characterized the Enlightenment came a corresponding rethinking and rationalization of jurisprudential thought. Just as advances in the field of science began to dispel many of the longstanding misconceived notions of the metaphysical nature of things, so too did the nature of law come to be viewed as a topic ripe for empirical inquiry.

Legal positivists, unlike their natural law predecessors, advocated the adoption of a scientific and diagnostic approach to the law. The approach of the positivists constituted a sharp contrast to the metaphysical and speculative way in which classical natural law theorists had traditionally regarded law as something prescribed by a superior force and over which man had no immediate control.²⁵ The positivist lawyer viewed law as a product of man himself - the object of the inquiry being the determination of what the law is. To a natural law lawyer living in Bentham's time, a valid law must have been consistent with

24 Hale, History of the Common Law (3rd ed.), at p. 44.

25 For an interesting examination of the interface between positivism and natural law see A. D'Amato, "Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence" (1975), 14 W.Ont.L.Rev. 71.

basic human values. Positivists, on the other hand, were not concerned with what the law ought to be - all that was considered necessary for a law to be valid was that the law be enacted in accordance with the proper authority.²⁶ This difference in approach is illustrated by Blackstone's statement that laws that conform with the theory of natural law "bind the conscience" while those laws that do not reflect natural law principles are incapable of doing so.

Jeremy Bentham was a legal positivist who rejected natural law theory, labelling it "nonsense upon stilts".²⁷ He criticized the use by natural law theorists of what he regarded as simplistic assertions of natural law principles to justify and sanctify the continued existence of established laws and institutions.²⁸ To Bentham, natural law was a device used to conceal defects in existing laws which merely encouraged people to believe "that the injustices and exploitation which they permit must be ascribed to nature and are beyond the power of men to change."²⁹

²⁶ Bentham regarded law, purely and simply, as a command of the sovereign. See King, supra note 6, at p. 19.

²⁷ See Anarchical Fallacies, Works, Vol. II, at p. 501.

²⁸ To Bentham, "... the real object of one who asserts natural rights was to engage others to join with him in applying force, for the purpose of putting things into a state in which he would actually be in possession of the right of which he thus claims to be in possession." Quoted in Lord Lloyd of Hampstead, supra note 13, at p. 153, fn 9.

²⁹ H.L.A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, (1982), at p. 2.

Having rejected the underlying premises of natural law theory, Bentham proceeded to launch a scathing attack on the English legal system. Some of Bentham's most severe criticisms were directed at Blackstone's Commentaries on the Laws of England.³⁰ He had no tolerance for what he regarded as the pretentiousness of Blackstone and other eighteenth century natural law proponents.³¹ He criticized Blackstone's conservatism and regarded the Commentaries as self-serving justifications of existing laws and institutions by reference to historical principles. To Bentham, the complacency which characterized the writings of Blackstone and Blackstone's contemporaries was particularly objectionable. He described Blackstone as " ... the dupe of every prejudice and the abettor of every abuse. No sound principles can be expected from that writer whose first object is to defend a system."³²

To Bentham, the conservative implications of natural law theory were particularly objectionable because he regarded the "historicist traditionalism" of natural law as a barrier to rational criticism of the existing legal order. Bentham found particularly abhorrent:

30 (1765). See Bentham's A Fragment on Government, published anonymously in 1776, which comprises a part of his Comment on the Commentaries.

31 A.A. Mitchell has described Bentham as a "great pricker of rhetorical bubbles", see "Bentham and His School " (1923), 35 Juridical Review 271, at p. 272.

32 Works, Vol. X, at p. 45.

"...the ease with which English lawyers swallowed and propagated the enervating superstition that ... abuses [in the system] were inevitable and natural ... He believed that only those who had been blinded to the truth that laws were human artefacts could acquiesce in these absurdities and injustices as things to be ascribed to nature." 33

In contrast to his natural law predecessors who viewed law as something handed down from a higher plane,³⁴ Bentham approached law and the legal order from a new scientific or empirical perspective. Having spurned the speculative metaphysical approach of natural law theorists as being contrary to empirical and observable scientific quantification, Bentham was able to bring the "Is" of legal inquiry "down to earth". As Finch has explained, the "Is of legal positivism consists in the existence of human law and its methods of study are strictly confined to this sphere of existence." 35

Bentham articulated the parallelism between law and science in this way: "The law-giver should be no more impassioned than the geometrician. They are both solving problems by sober

33 H.L.A.Hart, Essays on Bentham: Jurisprudence and Legal Theory (1977), at p. 26.

34 As has been noted previously, most modern proponents of natural law or natural right have rejected the notion that laws are pronouncements handed down from some higher authority. Rather, modern natural law theorists regard natural law claims as a means of identifying "conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct." Finnis, supra note 21, at p. 18.

35 Finch, supra note 19, at p. 41.

calculation." 36 John Stuart Mill, acknowledging Bentham's influence on modern legal thought, commented as follows:

"He has swept away the accumulated cobwebs of centuries -

...

He found the philosophy of law a chaos, he left a science; he found the practice of the law an Augean stable, he turned the river into it which is mining and sweeping away mound after mound of its rubbish".37

Bentham rejected the basic tenet of natural law theory that "what exists ought to be" and propounded that law should properly be regarded merely as an expression of human will. Laws, to Bentham, were purely and simply commands of the sovereign. As King has explained, to "admit of a higher law is to limit the sovereign and sovereignty is by definition illimitable."38 Bentham also rejected the notion that men possess a series of natural rights flowing from some higher source. To Bentham this view of natural rights was a "political fallacy".39 Purely and simply, Bentham considered rights to be "fruits" of positive law

36 Bentham, Deontology (Vol. 2), at p. 19.

37 John Stuart Mill, Essay on Bentham in Mary Warnock (ed.), Utilitarianism/ On Liberty/ Essay on Bentham (1962), at pp. 106-107.

38 King, supra note 6, at p. 19.

39 Bentham called France's 1793 Declaration of the Rights of Man a "perpetual vein of nonsense", A Book of Fallacies, Works II, p. 379. For an interesting discussion of Bentham's views on natural rights see H.L.A. Hart, Essays on Bentham (1982), supra note 28, ch. IV. See also, generally R.G. Frey (ed.), Utility and Rights (1984).

with no independent existence.⁴⁰ Bentham attempted to "demystify" the law by stripping the notions of law and basic rights of the metaphysical characteristics which had been ascribed to them by his natural law predecessors and propounding that laws were rudimentary commands of the sovereign. Peter King explains that Bentham, with the help of John Austin:

"... exposed the absurdities of the English common law in the clear light of rational analysis. The aura of mystery and respect that had enshrouded the common law since the days of Sir Edward Coke was dissipated by the sharpness and vigour of their onslaughts. Furthermore, they began to see law and its connection with the state in a new light. The study of law was closely wedded to the study of political power. Law in their eyes became a matter of reality, not metaphysics; the product of force, not right."⁴¹

In the course of this transition Bentham came to perceive law as "something men add to the world, not find within it."⁴² It is this somewhat revolutionary perception of law as something "man made" which some have credited as one of the greatest contributions to legal reform ever to have come from one mind.⁴³

40 "Rights are the fruits of the law and the law alone; there are no rights without law - no rights contrary to law - no rights anterior to the law." Works III, p. 221.

41 King, supra note 6, at pp. i-ii.

42 H.L.A. Hart, Essays on Bentham: Jurisprudence and Legal Theory, supra note 32, at p. 26. For an illuminating account of Bentham's "demystification" of the law see Hart, ch. I.

43 Finch, supra note 19, at pp. 70-71.

(b) The Principle of Utility

As an analytical tool for examining and criticizing the structure and operation of the English legal system, Bentham adopted the principle of utility. According to some authors, the roots of the principle of utility can be traced back to the writings of Epicurus.⁴⁴ Others contend that the first glimmers of utilitarian thought are reflected in the work of Beccaria who suggested that public utility should be the basis upon which law is built.⁴⁵ Aspects of utilitarian philosophy are also evident in the works of numerous other distinguished scholars who preceded Bentham including Hume,⁴⁶ Priestley,⁴⁷ Helvetius⁴⁸ and Montesquieu.⁴⁹ Notwithstanding that Bentham himself acknowledges that these earlier philosophers greatly influenced his thought and his pen, many modern writers still credit Jeremy Bentham with

⁴⁴ See, e.g., the discussion in John Stuart Mill, Utilitarianism (1979).

⁴⁵ Beccaria's book entitled Dei Delitti e Delle Pene was published in 1764. Beccaria suggested in this book that public utility should be the basis of law and that legislation should be founded upon the greatest happiness principle. For a translation of Beccaria's work see Farrer, Crimes and Punishments. The influence of Beccaria on Bentham's work is canvassed in Hart, supra note 32, ch. II.

⁴⁶ Inquiry into the Principles of Morals, (1751); Political Discourses, (1752).

⁴⁷ See Essay on Government, (1768).

⁴⁸ De l'esprit, (1758); De l'homme (1772).

⁴⁹ Esprit des lois, (1748).

being the spiritual, if not the actual, "father" of the modern school of utilitarianism.⁵⁰

Clearly, the underlying principles of Bentham's writings were not original to him. The foundations of utilitarian thought were already well established in scholarly literature. However, Bentham was inspired by and drew upon the writings of these earlier philosophers:

"... from each of them Bentham drew only what he was looking for. He borrowed phrases but the principle of utility as he came to understand and use it was entirely his own invention." ⁵¹

What distinguished Bentham from his predecessors was the fact that he introduced "exact method" into his discussions of the utilitarian model. In Wesley Mitchell's view, what made Bentham stand out from the rest and what renders Bentham's work relevant and instructive to this day was his effort:

" ... to make legislation, economics, ethics into genuine sciences. His contemporaries were content to talk about utility at large; Bentham insisted upon measuring particular utilities - or

⁵⁰ See e.g., C. Phillipson, Three Criminal Law Reformers: Beccaria, Bentham and Romilly, supra note 11; Lord Lloyd of Hampstead, Introduction to Jurisprudence, supra note 13; Whewell, Lectures on the History of Moral Philosophy in England (1852), lecture xiii; W. C. Mitchell, "Bentham's Felicific Calculus" (1918), 33 Political Science Quarterly 161 ; Windeyer, supra note 20, at p. 277.

⁵¹ Letwin, The Pursuit of Certainty (1965), at p. 139 cited in Lord Lloyd of Hampstead, Introduction to Jurisprudence (3rd ed.), supra note 13, at p. 153.

rather, the net pleasures on which utilities rest."⁵²

The principle of utility is, in Bentham's own words, the very foundation of his work on morals and legislation.⁵³ Notwithstanding that neither the principle of utility itself, nor the application of the principle to the arenas of law, politics and government were original to him, "no philosopher has embraced a doctrine more consistently or systematically as Bentham has done."⁵⁴ The principle of utility provided Bentham with a consistent and rigorous yardstick against which to measure and evaluate the laws and legal institutions of his time.

Utilitarian theory is based upon the premise that mankind is governed by two fundamental motivations - the pursuit of pleasure and the avoidance of pain.⁵⁵ According to Bentham, man tends to act in furtherance of his own self-interest, which interest is identified with happiness.⁵⁶ Bentham defined "happiness" as "the

⁵² "Bentham's Felicific Calculus", supra note 48, at pp. 163-64.

⁵³ See Bentham's Introduction, supra note 7, at p. 11: "The principle of utility is the foundation of the present work."

⁵⁴ Lyons, In the Interest of the Governed, supra note 10, at p. 19.

⁵⁵ "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do." Introduction, supra note 7, at p. 11.

⁵⁶ Whether these two premises are reconcilable has been the subject of much academic debate. For the view that the premise that man acts egocentrically in furtherance of his own happiness is not fundamentally incompatible with the premise that he should

possession of pleasures with the absence of pains, or the possession of a preponderant amount of pleasure over pain." 57 To Bentham, the most desirable way of permitting members of society to seek pleasure or happiness was for the government to interfere to the least possible extent with the activities of individual members of society. As Windeyer explains Bentham's observation, "if each individual were at liberty to seek his own good, the greatest good for all would result." 58

According to Bentham's theory, the value of any action should be judged by its effect in promoting happiness - the surplus of pleasure over pain. Expressed as a mathematical equation, an action would be considered to conform to the principle of utility if the total quantity of pleasure resulting to the persons affected exceeded the total amount of pain. Conversely, an action would be considered to violate the principle of utility if the quantity of resulting pain exceeded the quantity of resulting pleasure. This principle of utility, which is sometimes described as 'the greatest happiness principle' or 'the greatest good for the greatest number' is the very cornerstone of utilitarian theory.

act so as to serve the greatest happiness of the greatest number see e.g., D. Lyons, In the Interest of the Governed, supra note 10, at pp. 12-18.

57 Bentham, Introduction, supra note 7.

58 Windeyer, supra note 20. at p. 278.

John Stuart Mill described the underlying premise of utilitarianism as follows:

" ... actions are right in the proportion as they tend to promote happiness; wrong as they tend to promote the reverse of happiness. By happiness is intended pleasure; by unhappiness pain and the privation of pleasure."59

According to Bentham's theory, the greatest happiness of the greatest number is what is to be strived for whether one is judging the act of an individual or an act of government. In practical terms, it is not the act itself that is being judged but rather the consequence or consequences that such act is likely to have. In order to properly apply the principle of utility, therefore, one must endeavour to predict the outcome of a given act. As David Lyons has explained:

" ... [t]he principle of utility alone does not suffice to tell us which specific acts are right or wrong. In order to discover that, one must apply the principle, and then one must be willing to predict an action's consequences. For it is the effects that acts have (or that they are likely to have), and nothing else, which determine what one should do." 60

Pleasure and pain were considered by Bentham to flow from four sources - the physical, the political, the moral and the

59 J.S. Mill, Utilitarianism (1957), at p. 10.

60 Lyons, supra note 10, at p. 20.

religious.⁶¹ "Physical" pains and pleasures were those derived, generally speaking, from the forces of nature. Those of a "political" nature were thought to be those dispensed by a particular person or set of persons in the community chosen for the purpose of making such dispensations according to the will of some sovereign power of the state. Pleasures and pains which flowed from "moral" sources were considered by Bentham to be derived from the actions of random individuals in the community spontaneously and not according to any settled rule. Lastly, "religious" pains and pleasures were handed out by a superior invisible being, either in this life or in some future life.

In order to illustrate more effectively these four sources from which pain and pleasure may be derived, Bentham offered as an example the case in which a man's possessions are consumed by fire. If the fire were an accident, occasioned perhaps by the man's own lack of caution, the fire was a result of "physical" forces. If the fire represented a punishment imposed by a magistrate, the loss would be considered to be a "political" sanction. An example of a "moral" sanction would be if the fire were started by a neighbor where the neighbor's conduct was motivated by a dislike of some aspect of the victim's moral character. If the fire were a manifestation of God's

⁶¹ See, Introduction, supra note 7, at p. 34. See also, W.C. Mitchell, "Bentham's Felicific Calculus", supra note 48.

displeasure, the fire would be said to be a "religious" sanction.⁶²

Bentham's personal form of utilitarian philosophy did not take account of qualitative differences between pleasures and pains from these four sources. Unlike other utilitarian theorists such as Mill who spoke of 'higher' and 'lower' pleasures, to Bentham the only meaningful way of comparing competing pleasures was to consider the quantity of pleasure involved.

In assessing the quantity of pleasure, Bentham suggested that the following seven characteristics ought to be weighed:

- (1) duration
- (2) intensity
- (3) certainty or uncertainty
- (4) proquinity or remoteness
- (5) fecundity (i.e., the chance of the pleasure being followed by further pleasures)
- (6) purity (i.e., the chance of the pleasure not being followed by pain)

Considerations (5) and (6) were not considered by Bentham, strictly speaking, to be relevant in valuing the pain or pleasure

⁶² Bentham, Introduction, ibid., at p. 36.

itself but rather to be taken into account as properties of the act by which such pleasure or pain is produced.

In addition, where the interests of a number of persons rather than a single individual were being considered, the extent of the pleasure constituted a seventh factor to be taken into account. By extent, Bentham meant the number of people to whom the pain or pleasure would extend or, in other words, the number of people who would be affected.⁶³

An essential element of Bentham's principle was that it should apply indiscriminately and universally. If the utility of an act to the community at large rather than to a single individual were being considered, the interests of all "members of the community in question" should be taken into account and accorded equal weight.⁶⁴ Bentham considered the community to be a fictitious body comprised of individuals and to him, the interest of the community comprised the "sum of the interests of the various members who compose it" and that the primary goal of politics must be to advance the interests of the community.⁶⁵

⁶³ For an analysis of when the interest of an individual should be determinative as opposed to the situations in which the interest of the community should be considered to override see D. Lyons, In the Interest of the Governed, supra note 10.

⁶⁴ In Bentham's words, "every one to count for one and no one for more than one."

⁶⁵ Introduction, supra note 7, at p. 12.

The discussion following will explore the manner in which Bentham transposed these views into the sphere of law reform.

(c) Bentham and Censorial Jurisprudence - Use of the Principle
of Utility to Critically Examine the Existing
Legal Order

The discard of natural law principles and the adoption of the perception of law as something created by Man rather than derived from God or from the forces of nature led to the recognition that defects in the law and legal institutions could also be mended by Man. Laws and legal institutions, in Bentham's view, were not simple by-products of a destiny pre-programmed by superior forces. Purely and simply, they represented concrete reflections of conscious human decision-making and, like any other product of the decision-making process, could be revised or reversed. This new way of looking at law removed obstacles to law reform set up by natural lawyers whose adherence to the principle that "what naturally is, ought to be",⁶⁶ had led them to accept and justify the continued existence of the status quo. "With Bentham came the advent of legal positivism and with it the establishment of legal theory as a science of investigation as distinct from the art of rational conjecture."⁶⁷

66 See Finch, supra note 19, at p. 21.

67 Ibid., at p. 40.

In his writings, Bentham drew a clear distinction between his descriptions and explanations of existing law, and his criticisms of such law together with proposals advocating its reform. He called the former "expositorial jurisprudence" and labelled the latter "censorial jurisprudence". Bentham's expositorial writings are expansive and represent a valuable contribution to jurisprudence. However, Bentham's real talent lay in the role as censor - his development of the censorial model for critically examining existing laws and legal institutions is characterized by some as a turning point in the advancement of legal philosophy. One author has described Bentham's contribution to critical legal theory as follows:

"He, more than anyone else, developed utilitarianism as a general theory of evaluation; ... He insisted on rigorous analytical methods in legal theory, and he revolutionized jurisprudence by carefully distinguishing what law is from what he would like it to be, while concerning himself with both questions."⁶⁸

To Bentham, the task of the expositor and the task of the censor were separate and distinct. One of his criticisms of classical natural law theorists was that they confused and muddled these two functions.⁶⁹ For example, he fundamentally disagreed with Blackstone's statement that laws which fail to comply with the laws of nature should be transgressed "... or

⁶⁸ D. Lyons, In the Interest of the Governed, supra note 10, at pp. 1-2.

⁶⁹ See Hart, supra note 32, at p. 41.

else we must offend both the natural and the divine."70 To Bentham, Blackstone's test for assessing the validity of a law by reference to abstract notions of natural law was both socially inexpedient and politically dangerous. "I see no remedy but that the tendency of such a doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatsoever, that he happens not to like." 71

Although one of the themes evident in Bentham's writings is expressed by the maxim "obey punctually, censure freely"72 he was not an advocate of civil disobedience unless such disobedience was well justified.73 Generally speaking, he felt that positive laws should be obeyed. To Bentham, the existence of a positive law carried with it a moral duty of compliance. At the same time, however, he felt that laws and legal institutions should be regarded as prime targets for criticism and should regularly be subjected to reform in light of such criticism.

70 Blackstone, Commentaries on the Laws of England, Ch. I.

71 A Fragment on Government [Oxford Edition, 1948], Ch. 4, at p. 19.

72 See Bentham's A Fragment on Government, ibid., preface, at p. 10.

73 Bentham felt that citizens had a responsibility to react rationally to "bad laws". For an analysis of Bentham's views on civil disobedience and his reaction to the French revolution see Hart, supra note 32, ch. IV.

In his role as censor, Bentham used his principle of utility as a tool for assessing the substance and the administration of the English common law system and found them both to be sadly in need of reform. He measured the worth of a given law or legal institution by the degree to which it tended to produce benefit or advantage, or prevent pain or disadvantage, to society or the sector of society affected by it. One author has described Bentham, in his censorial role, as "perhaps as formidable a destructive critic of law as ever lived. He called on every institution to justify its existence."⁷⁴

In adopting and developing his critical and somewhat radical perspective for analyzing the law, Bentham carved a niche for himself in history as one of the first law reformers. Sir Henry Maine has suggested that there has been no law reform effected since Bentham's time which cannot be traced to his influence.⁷⁵ Lord Brougham, one of Bentham's contemporaries, described Bentham in these terms:

"He is the father of the most important of all the branches of reform, the leading and ruling department of human improvement. No one before him had ever seriously thought of exposing the defects in our English system

⁷⁴ N. Grundstein, "Bentham's Introduction to the Principles of Morals and Legislation", [1954] J. of Public Law 171, at p. 172.

⁷⁵ Early History of Institutions, at p. 397, cited in Keeton and Schwarzenberger (eds.), Jeremy Bentham and the Law, supra note 11, at p. 20.

of jurisprudence." 76

The chapter following will survey the influence of Bentham's principle of utility and his use of this principle in criticizing existing laws and advocating proposals for reform some two hundred years later on the Law Reform Commission's efforts at reforming Canadian criminal law in the 1980's.

76 Speeches of Lord Brougham, cited in Keeton and Schwarzenberger, ibid., at p. 23.

CHAPTER TWO: UTILITARIANISM - A CRITICAL REASSESSMENT

Much has been written on the deficiencies of utilitarian theory.⁷⁷ The purpose of this Part is to identify the aspects of utilitarian philosophy which have been the primary targets of criticism, to briefly survey these identified shortcomings and to provide the reader with a clear understanding of the problems which arise in applying the principle of utility in practice, particularly in modern pluralist society.

In this Part, the following major deficiencies of utilitarian theory will be discussed:

- consequentialism
- imprecision in measurement and distribution
of net utility
- incompatibility of utilitarianism

⁷⁷ See e.g., Michael Bayles (ed.), Contemporary Utilitarianism (1968); Wesley Cooper et al., New Essays on John Stuart Mill and Utilitarianism (1979); Samuel Gorovitz (ed.), Utilitarianism: John Stuart Mill with Critical Essays (1971); H.L.A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, supra note 28; D. Hodgson, Consequences of Utilitarianism: A Study in Normative Ethics and Legal Theory (1967); David Lyons, In the Interest of the Governed: A Study of Bentham's Philosophy of Utility and Law, supra note 10; B. Parekh, Jeremy Bentham: Ten Critical Essays (1974); A. Quinton, Utilitarian Ethics, supra note 5; Nicholas Rescher, Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution, supra note 12 A. Sen and B. Williams (eds.), Utilitarianism and Beyond, supra note 3.

and individualism

- justice, fairness and morality as factors
at odds with utility

(a) Consequentialism

To a utilitarian, an action is right if it contributes greater happiness to a greater number of people than would any of the other possible courses of action which could be adopted in the same set of circumstances. In choosing which of two or more alternative courses of action should be adopted, the actor (whether it be an individual or a legislator) is charged with the task of making an assessment of the relative "happiness" which would flow from each of the alternatives available.

This exercise of balancing the relative benefits and harms of an act or course of action is the central core of utility theory. There are, however, practical difficulties inherent in applying a theory which requires an assessment in the present of the in futuro consequences of conduct.⁷⁸ Quinton explains that utilitarianism imposes:

" ... an impossible burden of calculation

⁷⁸ Some of these difficulties are canvassed in F. Hahn, "On Some Difficulties of the Utilitarian Economist", in Sen and Williams, Utilitarianism and Beyond, supra note 3, at pp.195-198. See also T. Benditt, "Liability for Failing to Rescue" (1982), 1 Law and Philosophy 391.

on the moral agent. In every situation it requires him to determine all the possible lines of action he could adopt, including inaction, and then to calculate what the total consequences for the general happiness of each of these alternatives would be." 79

The problem with this aspect of utility theory is that "if the consequences of actions are uncertain then so are their utility consequences."⁸⁰ How can anyone be in a position to assess consequences which may or may not actually occur at some undefined point in the future? If future consequences cannot be known, how can relative utility be evaluated?⁸¹

The consequences of any action may be significantly affected, or indeed fundamentally altered, by any one or combination of unforeseen or unforeseeable intervening factors. Theodore Benditt has suggested that there are far too many unknown quantities which may affect the outcome of the utility equation.⁸² These unknown quantities severely hamper the usefulness of the utility test. In Benditt's words, "though one is always uneasy with arguments that rely on assessments of the

79 Quinton, supra note 5, at p. 47.

80 Hahn, supra note 3, at p. 195.

81 The problems raised by the uncertainty of the consequences of acts are also discussed in Hahn, ibid., at pp. 187-198.

82 Supra note 3, at p. 407.

long term consequences ... and the reactions of a large number of people", utilitarianism involves "too many imponderables."⁸³ Even if future consequences could be known, the choice of which consequence would result in the "greater happiness" is bound to vary depending on who is making the decision and the factors which are taken into account, or indeed those which are ignored, by the decision-maker.⁸⁴ These difficulties in valuing utility are derived from the inherent impossibility of transposing individual preferences "to an interpersonal, public measure of an inter-subjective"⁸⁵ notion of utility and may result in vastly different utility quotients in similar fact situations.

(b) Imprecision in Measurement and Distribution of Net Utility

Utility, even if it is looked at simply as the sum of "good things" is an extremely elastic concept. Different people have different ideas about what is "good" or desirable.⁸⁶ Such notions are inherently subjective, affected by the individual decision-maker's internal beliefs, prejudices and thought

⁸³ Ibid.

⁸⁴ As J.C.C. Smart has pointed out, happiness is an evaluative concept - "two utilitarians might come to advocate very different courses of action if they differed about what constituted happiness, and this difference between them would be simply an ultimate difference in attitude." See J.C.C. Smart and B. Williams, Utilitarianism For and Against (1973), at p. 24.

⁸⁵ Rescher, supra note 2, at p. 10.

⁸⁶ See Smart, supra note 82.

processes. One author has clearly enunciated the definitional problem by posing the following question:

"Is not utility a treacherous abstraction
beguiling us into a misleading monistic
simplification, whereas in reality there
is at issue an enormous plurality of goods
and value-measures of very different kinds?"⁸⁷

Although it might be said that the subjective preferences of the decision-maker are bound to affect the application of any rule or theory, if utilitarianism is tied solely to an assessment of net utility measured by reference to the "good" flowing from an act and if there can be no consensus as to what is meant by a "good" consequence, how can the concept provide a useful yardstick for measuring the rightness or wrongness of human conduct? By focusing on the "subjective pleasures, satisfactions or preferences of the actor" utilitarianism makes no effort "to judge these wants against the standard of some ideal."⁸⁸

Compounding the difficulties inherent in identifying and balancing the utility quotients of alternative courses of action is the question as to whether the "greater happiness" is really an appropriate standard of measurement at all.⁸⁹ As Ayer points

⁸⁷ Rescher, Distributive Justice, supra note 2, at pp. 9-10.

⁸⁸ This is discussed in Ernest J. Weinrib, "Utilitarianism, Economics and Legal Theory" (1980), 39 Univ. of Toronto Law J. 307, at p. 309.

⁸⁹ See, e.g., A.J. Ayer, "The Principle of Utility", in Keeton and Schwarzenberger (eds.), supra note 11; Sen and Williams, supra note 3.

out: "[w]hat is right for the individual is not necessarily right for the community."⁹⁰ As will be discussed later,⁹¹ this is a theme which has emerged in the case law developing under the Charter. The rights of the individual are bound to conflict with the rights of others and with the interests of society as a whole. Utilitarian methodology permits the wishes or interests of the collectivity to dictate. In stark contrast, however, the Charter is aimed primarily at protecting the fundamental rights of individuals. Laws or governmental actions which intrude on such rights, even if they further some objective which advances the greater good, must satisfy very strict criteria or be liable to being struck down by the courts as violating the terms of the Charter.

In the same vein, something may be strongly desired by an aggregate of individuals in society but this "will of the majority", in itself, does not necessarily make the implementation of what is desired by the majority sound from a public policy point of view.⁹² Thus, for example, the fact that ninety percent of the population favours enslaving a racial minority and putting them to work for the majority would not be

⁹⁰ Ayer, ibid., at p. 249.

⁹¹ See chapter three.

⁹² As Hahn has pointed out, to utilitarians the "utility consequences of social actions are highly relevant to the evaluation of ... actions. But there is, in general no way in which these consequences can be aggregated and ... it seems simply wrong to assert that these consequences are the only relevant criteria for evaluating social actions", supra note 3, at p. 188. See also, Sen and Williams, supra note 3, at p. 6.

socially desirable though it might result in the "greater happiness for the greater number" and would, in theoretical terms, be supported by utilitarian theory.⁹³ The converse is also true - something may be socially valuable even though it is not desired by anyone. As Sen points out, "if it is accepted that for something to be important it must be desired by someone (or must give pleasure or reduce pain, i.e., in some sense yield utility), it may be questioned whether the metric of utility provides the appropriate measure."⁹⁴

The problem illustrated by the following equation:

$$\begin{array}{l} \text{greatest good for} \\ \text{greatest number} \end{array} = \text{utility} = \text{sound public policy}$$

stems, at least partly, from the fact that utilitarianism proceeds from the premise that all interests count equally and are deserving of equal weight.⁹⁵ In identifying and weighing the relative benefits and harms which would result from alternative courses of action, no accounting is made of the relative deservingness of competing claims.⁹⁶ The underlying

93 Hahn, ibid.

94 Sen, supra note 3, at p. 6.

95 In Bentham's own words, "every one to count for one and none for more than one."

96 As Weinrib has pointed out, utilitarianism "makes no distinction between wants of similar intensity and places no value on the judgment as to the worthiness of particular wants ...", supra note 86, at p. 309.

desirability, in terms of inherent social worth, is not an element in the balancing equation. Utility "leaves wholly out of account that essential reference to claims, merit and dessert." 97

Whether the underlying social "worth" of behaviour should be taken into account in assessing utility is a question which has prompted a considerable amount of academic debate dating back to the conflict between Bentham and Mill.⁹⁸ To Bentham, the maximization of the preferences of individuals was, in and of itself, a desirable social end.⁹⁹ He was not concerned with the underlying social worth of the action in assessing its utility. In Bentham's own words, "the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either."¹⁰⁰

97 Rescher, supra note 2, at p. 48.

98 This conflict is summarized in Smart, supra note 82, at pp. 12 - 27. Smart has analogized the debate of push-pin vs. poetry to the problem in Voltaire's dilemma of the unhappy sage and the happy fool, "Histoire d'un bon Bramin" in Choix de Contes (1951).

99 Ibid. See also Amy Gutman, "What's the Use of Going to School? The Problem of Education in Utilitarianism and Rights Theories" in Sen and Williams, supra note 3, at pp. 261 - 277.

100 Works, Vol. II, Book III, Ch. I, p. 253. Another attraction of push-pin to Bentham was the fact that everyone could play push-pin while poetry and music were "relished only by a few."

Some have taken issue with this approach, however. Mill, for example, drew a distinction between "higher" and "lower" pleasures. Mill would argue that poetry contributes more to the happiness of others than does push-pin and that poetry is therefore an activity which conforms to a greater extent with the principle of utility. Similarly, J.C.C. Smart has suggested that "the reading of poetry may develop imagination and sensitivity and so as a result of his interest in poetry a man may be able to do more for the happiness of others than if he had played pushpin and let his brain deteriorate."¹⁰¹

The failure of utilitarianism to provide an answer to the question of whether or not social worth is a factor which should be taken into account may be viewed as a manifestation of a larger defect which is identified in the critical literature - that the principle of utility cannot adequately serve as a general theory of evaluation because of its failure to provide adequate criteria or guidance for carrying out the task of assessing which of alternative courses of action will produce the greatest good for the greatest number of people.¹⁰² Nicholas Rescher, for example, has described the principle of utility in its unqualified state as "patently incomplete as an effective means for deciding between alternative distributions of good."¹⁰³

¹⁰¹ Smart, supra note 82, at p. 24.

¹⁰² For an excellent synopsis of this perceived shortcoming of utilitarianism see Rescher, Distributive Justice, supra note 2, at pp. 25-40.

¹⁰³ Ibid., at p. 26.

Sidgwick has suggested along the same lines that there are many different ways of distributing the same quantum of happiness - in order that "the utilitarian criterion of right conduct may be as complete as possible, we ought to know which is to be preferred ... [but] the utilitarian formula seems to provide no answer to this question."¹⁰⁴

Quite apart from measuring the quantum of utility that is available for distribution one must also address the question of what pattern of distribution results in the "greatest good for the greatest number". How does one decide whether Scheme A or Scheme B conforms best with the principle of utility? By reference to what criteria is such an assessment to be made? Rescher suggests that utilitarianism does not provide an adequate answer to this dilemma because it simply does not supply any meaningful criteria by reference to which utility can be measured. Rescher concludes that the answer cannot be found by simple reference to the "two factor criterion" expressed in utilitarian theory and suggests that the "two factor criterion"- the greater good, the greater number - actually work in direct conflict with each other in certain circumstances. In order to solve this dilemma some theorists have adopted a "one factor criterion" and would assess the relative utility of alternative courses of action by reference to only one or the other of the greater good or the greater number. Neither of these formulae,

¹⁰⁴ H. Sidgwick, The Methods of Ethics, supra note 5, Book IV, Ch. 1.

however, are workable in practice or represent an improvement over Bentham's "felicific calculus". 105

(c) Informational Blinders - the Incompatibility
of Utilitarianism and Individualism

Not only does utilitarianism fail to provide meaningful criteria for assessing which course of action will result in the greater net utility but it also imposes strict constraints on the type of information which may be taken into account in making this decision. Utilitarianism, in its classical form, requires that the decision-maker simply add up "individual welfares or utilities to assess consequences, a property that is sometimes called sum ranking." 106 By virtue of this process a great deal of information which pertains to the personal desires, motivations and other personal characteristics of individuals is left by the wayside and is not factored into the utility equation.107 As Sen explains:

105 Other possible variations which may be introduced to render the principle of utility more serviceable in practice will be discussed in chapter three of this Paper.

106 Sen and Williams, supra note 3, (Introduction), at p. 4.

107 See Weinrib, supra note 86, at p. 309 who states that utilitarianism "requires an aggregation ... and it considers as best the outcome in which the total of individual satisfactions is maximized." The problem with this approach, suggests Weinrib, is that it is aggregative - "it looks to the summing of all preferences across persons rather than to the degree to which the wants of any given persons are satisfied."

"sum-ranking merges the utility bits together as one total lump, losing in the process both the identity of individuals and their separate-ness ... [I]n judging an action there is no intrinsic interest at all in the non-utility characteristics either of those who take the action, or of those who are affected by it. In judging an action there is no need to know who is doing what to whom so long as the impact of these actions - direct and indirect - on the impersonal sum of utilities is known." 108

In other words, utilitarianism is hampered by self-imposed informational blinders. Utilitarians look only at the quantum of "good" that, in arithmetic terms, would result from a given act without considering the pattern of such distribution among the community of individuals concerned.

The net effect of this process of sum-ranking and the very narrow spectrum of information that utilitarianism considers to be relevant to the assessment of the utility quotient renders utilitarianism fundamentally incapable of being reconciled with individualism. According to utilitarian theory, the greater good is considered to be more important than the welfare of a single individual:

"[U]tilitarianism has often been thought to disregard the trees and consider only the wood, to reduce the private aspirations of individuals to their lowest common denominator, something amorphous called the General Happiness; provided there is enough of it utilitarians don't care whether it is made by pushpin or of poetry. Nor does it matter whether it

is enjoyed by A or by B. It is a mere truth of arithmetic ...that equal amounts of happiness are equally desirable, whether felt by the same or by different persons." 109

The rather alarming conclusion which flows from this observation is that utilitarianism would appear to support the sacrifice of individual rights and security in furtherance of the interests of the greater whole.

The principle of utility, applied in its purest form, would sanction the conviction of an innocent man in a situation where such a conviction would prevent a riot and thereby save a great many others from possible death or physical harm.¹¹⁰ As Munro emphasizes, the utilitarian is committed to one thing only - to do whatever has the best consequences.¹¹¹ If a given course of action would, on the whole, have the best consequences on utilitarian grounds it must be preferred, even if at great cost to some innocent individual.¹¹²

Clearly, a political or legal philosophy which supports such a sacrifice of individual rights in favour of some abstract

109 D.H. Monro, "Utilitarianism and the Individual", in Cooper et al., New Essays on John Stuart Mill and Utilitarianism, at pp. 47-48.

110 Ibid., at p. 52.

111 Ibid.

112 Ibid. See also, Rescher supra note 2.

notion of "the greater good" is inconsistent with the thrust of the Charter, the yardstick against which all legislation is to be measured. Although some latitude is built into Section 1 of the Charter, which provides for restrictions on individual rights which constitute reasonable limits in a free and democratic society,¹¹³ and although group rights receive some serious attention in certain of its provisions, the overall and overwhelming tenor of the Charter is the advancement and protection of the rights of the individual. At a most basic level, therefore, it would appear that the majoritarian focus of utilitarian philosophy is completely incompatible with the pursuit of the protection of individual rights. If utilitarianism is capable of seeing only the forest and not the trees, then it is arguably an entirely inappropriate model for legislative action in modern Canadian society.

(d) Morality, Justice and Fairness - Considerations
at Odds with Utility

Another perceived defect of utilitarianism which is closely related to the fact that the informational constraints imposed by utilitarianism militate against consideration of individual traits and interests is that socially desirable ends such as

¹¹³ Section 1 provides that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

morality, justice and fairness do not factor into the utility equation. Utilitarianism's failure to take these important underlying factors into account compounds the difficulties inherent in assessing the relative "deservingness of competing claims"¹¹⁴ and deciding which course of action is to be preferred.

The utility principle, at its very core, is basically hedonistic in the sense that it assesses which act or course of action will result in the greatest good for the greatest number from a morally neutral perspective. To hard line utilitarians, the morality of an act is relevant only to the extent that it affects utility. Several authors have criticized utilitarianism's lack of regard for the underlying morality or immorality of behaviour.¹¹⁵ William Whewell, for example, has criticized Bentham's failure to recognize the moral object of law. To Whewell, the object of law is:

" ... to promote, not merely the pleasure of man, but his moral nature; not merely to preserve and gratify, but to teach him ... to conform to his nature as man: not merely as a sentient, not merely a gregarious, not

¹¹⁴ This terminology is borrowed from Nicholas Rescher's discussion of balancing competing claims in Distributive Justice, supra note 2.

¹¹⁵ See e.g., W. Whewell, "Bentham", in B. Parekh (ed.), Jeremy Bentham: Ten Critical Essays (1974). See also A.J. Ayer, "The Principle of Utility" in Keeton & Schwarzenberger (eds.), Jeremy Bentham and The Law, supra note 11, who states at p. 249 that "there is in Bentham's system both an opening and a need for a science of morality".

merely a social creature, but a moral creature."¹¹⁶

In assessing the relative utility which would flow from alternative courses of action it is not specifically relevant if one of the alternatives would involve a transgression of commonly held views of morality and the other would not.¹¹⁷ What if two actions would produce identical amounts of happiness? Should it not be relevant that act A involves a breach of morality and act B does not? Quinton suggests that where one act involves a breach of a rule such as promise-keeping or truth-telling, that act should have a lower utility value than the alternative act which does not involve such a breach.¹¹⁸ It would appear sensible for Quinton's rule to also apply to cases where underlying morality is at issue. The utility principle does not, however, make such allowances.

Like morality, justice and fairness are other factors which are not considered, in and of themselves, to affect the balance of the utility equation. Bentham himself regarded justice as an inherently obscure notion that should not be permitted to retard

¹¹⁶ Whewell, ibid., at p. 55.

¹¹⁷ On the question of rule-breaking see, George Fletcher, Rethinking Criminal Law (1978). Fletcher suggests at p. 791 that "the utilitarian rationale for the privilege of furthering the greater good muddles an important distinction. One question is whether the actor furthers the greater in violating the prohibitory norm."

¹¹⁸ Quinton, supra note 5, at p. 72.

the pursuit of happiness.¹¹⁹ The failure of utilitarian theory to take factors such as justice and fairness into account is considered by some scholars to be a serious shortcoming. It has been suggested that the utilitarian approach to the distribution of "happiness" cannot, by reason of its very nature, result in a fair or just distribution. Bayles has illustrated this premise by the following example:

"Suppose that one could perform only one of two acts, A or B, which would affect the happiness of ten people. If one performs A, then seven people will be very happy and three very unhappy. If one performs B, then none of the people will be very happy or very unhappy. That is, act A will result in the greatest total happiness but act B will result in happiness for each and every person." ¹²⁰

In the above example the application of the principle of utility prescribes preference for act A. But, say critics, this surely is "contrary to our common sense notions of justice."¹²¹ Others have argued in the same vein that the hedonistic approach of the utility principle cannot be reconciled with the pursuit of justice and fairness. To Rescher, "happiness maximization (or utility maximization) is not a good in itself - and certainly does not serve the interest of justice - regardless of how it is maximized."¹²² In order for justice to be served, the principle

¹¹⁹ See Rescher, supra note 2, at pp. 48-49.

¹²⁰ M. Bayles (ed.), Contemporary Utilitarianism, at p. 6.

¹²¹ Ibid.

¹²² Rescher, supra note 2, at p. 54.

must be qualified so that only objectively legitimate claims are considered and so that the resulting distribution is between individuals who are all "deserving".¹²³

The view that the utilitarian theory of distribution is incompatible with principles of justice and fairness is not, however, a unanimous one. R. M. Hare has pointed out that justice is often regarded as being at odds with utility but his view is that this need not necessarily be so.¹²⁴ Although Hare does not discuss what the notion of justice means to him, he suggests that justice and equality in distribution of utility are distinct:

"... [I]f we ask how we are to be just between the competing interests of different people, it seems hard to give any other answer than that it is by giving equal weight, impartially, to the equal interests of everybody. And this is precisely what yields the utility principle. It does not necessarily yield equality in the resulting distribution, ... but justice is something distinct."¹²⁵

It is evident from the preceding discussion that utilitarian theory has generated a great deal of academic comment. It is a school of thought which has attracted a great following but which has also attracted perhaps more than its fair share of critics.

¹²³ Rescher, *ibid.*, at p. 54.

¹²⁴ See R.M. Hare, "Ethical Theory and Utilitarianism" in Sen, *supra* note 3, at pp. 23-38.

¹²⁵ *Ibid.*, at pp. 26-27.

The great attraction of the utility principle is its universality - it can be applied in countless fact situations and in a wide variety of disciplines. Utilitarianism purports to provide an answer to all questions by reference to a homogeneous "standard of consistency and completeness".¹²⁶ However, it is this ambitiousness which some feel is its major weakness - it attempts to do too much in overly simplistic terms. It has been suggested that any theory which purports to provide an answer to everything and which manifests the degree of ambition displayed by utilitarianism is bound to fail.¹²⁷

The Chapter following will address the clash between utilitarian values and the values enshrined in and protected by the Charter. Part two of this Paper will canvass in some detail the extent to which public policy makers in the area of criminal law reform have endeavoured to embrace utility theory and will illustrate how the deficiencies of utilitarianism, discussed above, made it necessary for such policy makers to depart from or modify pure utilitarian principles in order to arrive at proposals appropriate for implementation in contemporary Canadian society.

126 Sen, supra note 3, at p. 16.

127 Ibid. See also, Weinrib, supra note 86, at p. 309 - 310.

CHAPTER THREE: THE CLASH BETWEEN CHARTER VALUES
AND UTILITARIAN THEORY

This Chapter will illustrate that the values imported into Canada's judicial system by the adoption of the Charter are fundamentally opposed to the considerations which are accounted for by Bentham's utility model. It is submitted that this polarization makes the application of utilitarian methodology an inappropriate model for assessing whether a given law or governmental act is a constitutionally defensible limit on individual rights, particularly in the criminal law context.

The enactment of the Charter and the corresponding entrenchment of fundamental rights in the constitution reflects Canada's commitment to the unwavering protection of the rights of individuals. This commitment, by necessary implication, exemplifies a rejection of the approach advocated by utilitarians which permits policies and legal rules to be formulated by reference solely to the pursuit of the greatest good for the greatest number in society. Professor Hogg has explained that Canada's Charter "guarantees a set of civil liberties that are regarded as so important that they should receive immunity, or at least special protection, from state action."¹²⁸ The fulfillment of this objective of the Charter is accomplished

¹²⁸ Constitutional Law of Canada (2nd ed.)(1986), at p. 651.

through Court challenges to laws or government activities which detrimentally affect individual, and in some cases group, interests. Laws or governmental activities which violate one or more of the rights guaranteed by the Charter may be declared by the courts to be of no force or effect.¹²⁹ If the Charter is intended to enunciate and protect individual rights, the values inherent in the recognition of the supreme sanctity of the individual must by nature clash irreconcilably with the process of conducting a majoritarian-based assessment of the greatest good for the greatest number. This is particularly true in the criminal law context where conviction of a criminal offence can result in serious penalties including the loss of personal liberty. The Chapter following will examine the approach the Supreme Court of Canada has adopted in some cases in carrying out the exercise of balancing the various interests involved.

(a) The Balancing Exercise - Rights v. Rights

The commitment of Canada to the protection of individual rights and the role of the Charter in balancing the rights of individuals against those of society as a whole was discussed generally in a number of early cases which interpreted Charter rights. In Law Society of Upper Canada v. Skapinker,¹³⁰ for example, the Supreme Court of Canada had this to say about the

¹²⁹ Ibid.

¹³⁰ (1984), 9 D.L.R. (4th) 161 (S.C.C.).

new Charter and the task of interpreting and applying its provisions:

"With the new Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court."¹³¹

A similar sentiment was expressed in the judgment of Mr. Justice Dickson in Southam v. Hunter¹³² in which the Court expressed a preference for a "broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects."¹³³ In the Hunter case the question before the Court was whether a provision of a federal statute which set out a procedure for authorizing Combines officers on ex parte application to enter premises and to seize certain documents offended section 8 of the Charter. In declaring the relevant provision of the legislation to be of no force or effect, the Court stated as follows:

"The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental

¹³¹ Ibid., at p. 168.

¹³² (1984), 11 D.L.R. (4th) 641 (S.C.C.).

¹³³ Ibid., at p. 650.

action."¹³⁴

A number of cases have clearly expressed the principle that the primary focus of the Charter must be on the protection of the rights of the individual and that any consideration that the government objective in question may serve some broader interest and favour the greater good must be subordinated. In the Southam case, for example, the Court addressed the nature of the conflict between the competing interests involved and observed that:

"... an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or seizure and not simply on its rationality in furthering some valid government objective."¹³⁵

In weighing the respective interests involved, the Court reaffirmed its commitment to a "purposive approach" to Charter interpretation.¹³⁶ In the Court's estimation, arriving at an appropriate balance between an individual's right to privacy and the greater good served by the government interest in gathering evidence should not depend on the subjective notions of

¹³⁴ Ibid.

¹³⁵ Ibid., at p. 652.

¹³⁶ For a good explanation of the "purposive" approach to constitutional interpretation see Dale Gibson, The Law of the Charter: General Principles (1985), ch. 2. See also, Eric Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 Can. Bar Rev. 560, at pp. 571-77.

individual judges but rather should be subject to some defined objective standard. The "purpose" of such objective standard for granting prior permission to conduct a search or seizure "is to provide a consistent standard for identifying the point at which the interests of the State in such intrusions come to prevail over the interests of individuals in resisting them."¹³⁷

A similar sentiment was expressed by the Ontario Court of Appeal in R. v. Noble.¹³⁸ In that case, the Court struck down a provision of the Narcotic Control Act¹³⁹ which granted the police broad powers of search and seizure pursuant to writs of assistance. The Court took into account that the legislative provision in question was designed to protect broad public interests and that law enforcement in the drug field would be seriously hampered if the police were deprived of their special powers. Notwithstanding these considerations, the Court concluded that the negative impact on individual rights by the exercise of the police powers sanctioned by the legislative provision in question was too great:

"It is self-evident, however, that the particular obstacles confronting law enforcement officers ... cannot justify the granting of powers of search and

¹³⁷ Ibid., at p. 658. This "purposive" approach has been reaffirmed by the Supreme Court of Canada in a number of subsequent cases including R. v. Big M Drug Mart Ltd. (1985), 18 D.L.R. (4th) 321 (S.C.C.) and Reference re Section 94(2) of Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486.

¹³⁸ (1984), 48 O.R. (2d) 643 (C.A.).

¹³⁹ R.S.C. 1985, c. N-1.

seizure which are unreasonable ...
and contravene the constitutional
standard of reasonableness prescribed
by s. 8 of the Charter."140

Notwithstanding the broad statements of principle in these decisions and the Charter's clear commitment to the protection of the individual, the rights of the individual sometimes conflict with those of the community as a whole and, in certain cases, are not absolute. Rights, even those guaranteed under the Charter, must be subject to reasonable limits. As Chief Justice Dickson has observed:

"The rights of one citizen will inevitably clash with those of his or her neighbors. The rights of the individual will sooner or later conflict with those of the collectivity."141

In modern life, cases will inevitably arise in which government objectives in furtherance of some greater goal warrants overriding a constitutionally guaranteed right or freedom.¹⁴² For this reason, section 1 of the Charter provides that the rights and freedoms guaranteed by it are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In order to be upheld as a reasonable limit on a fundamental freedom supportable

140 Ibid., at p. 657.

141 Address to Princeton Alumni Association, April 25, 19985 quoted in Gibson, supra note 134, at p. 134.

142 Big M Drug Mart, supra note 135, at p. 366.

under section 1 two criteria must be met. First, the means which the limit entails must be reasonable. Second, the purpose of the limit must be "demonstrably justified".¹⁴³

The Supreme Court of Canada elaborated upon the meaning of "reasonable limit" and "demonstrably justified" in the landmark decision in R. v. Oakes¹⁴⁴ which involved the constitutionality of a reverse-onus provision in the Narcotic Control Act.¹⁴⁵ The Court stressed that government objectives which are "trivial or discordant" do not satisfy the "justifiable purpose" requirement and should not be entitled to section 1 protection. "It is necessary, at a minimum, that an objective relate to concerns that are pressing and substantial."¹⁴⁶ If the limitation constitutes a "justifiable purpose" then it is appropriate to go on to consider whether the means adopted to achieve the end sought are reasonable. On this point, the Court identified three criteria for balancing the interests of the individual against those of society as a whole:

(1) the measures adopted by the government must not be arbitrary, unfair or based on irrational considerations and must be rationally connected to the objective;

(2) the means should impair as little as possible the right or freedom in question;

(3) there must be proportionality between the effects

¹⁴³ Big M Drug Mart, ibid.

¹⁴⁴ [1986] 1 S.C.R. 103.

¹⁴⁵ Supra, note 139.

¹⁴⁶ Ibid., at pp. 138-139.

of the measures and the objective which has been identified as of "sufficient importance."¹⁴⁷

Even if criteria one and two above are satisfied, a measure will not be justified if the hardship imposed by the effects of a measure on a group outweighs the purpose the measure is intended to serve. In the Court's words:

"The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified".¹⁴⁸

It is apparent from the preceding passages drawn from leading Charter cases that the basic tenets of utility theory clash irreconcilably with the thrust of the Charter of Rights. In the environment created by the Charter which is characterized by an unwavering commitment to Charter values and to the pursuit of the protection of individual rights, utilitarian considerations are not appropriate factors to be taken into account in deciding whether existing laws are valid, or indeed whether they should be subjected to law reform measures. This rejection of utilitarian considerations in assessing whether a law or procedure is valid and whether a restriction on fundamental freedoms is "demonstrably justified" in a free and democratic society was emphasized by Madame Justice Wilson in Singh v. Minister of Employment and Immigration; Thandi v.

¹⁴⁷ Ibid., at p. 139.

¹⁴⁸ Ibid., at p. 140.

Ministry of Employment and Immigration.¹⁴⁹ That case involved a challenge to certain federal statutory provisions on the ground that they infringed the individual rights to fundamental justice and violated section 7 of the Charter. The Court concluded that the question of whether a limit is justified under section 1 of the Charter should not be influenced by the convenience to the government of the limitation in question or the cost of providing procedures which would not constitute restrictions on fundamental freedoms. More particularly, in response to the claim by the government that the measures were justified because the Immigration Board was overworked and that a requirement to hear appeals from refugee claim decisions would impose a severe administrative burden, Madame Justice Wilson stated:

"... I have considerable doubt that the type of utilitarian consideration brought forward ... can constitute a justification for a limitation on the rights set out in the Charter."¹⁵⁰

The Court went on to say that rights guaranteed under the Charter would be "illusory" if:

"... they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument ... misses the point of the exercise under section 1."¹⁵¹

149 (1985) 17 D.L.R. (4th) 422 (S.C.C.).

150 Ibid., at p. 469.

151 Ibid., at pp. 468-69.

The thrust of Madame Justice Wilson's comment is that in making a determination as to whether a restriction on fundamental rights is justified, it is necessary to balance "rights against rights". It is not sufficient (or indeed appropriate) to balance rights against mere social utility in interpreting a rights-based document.

The principle which, it is submitted, is illustrated by these early cases is that in the environment created by the Charter, the greatest good for the greatest number may often be sacrificed in favour of individual liberties. Measures which may well serve the greater common good in terms of protecting broad public interests by facilitating law enforcement, saving tax dollars or increasing administrative efficiency may be struck down despite their rational objectives in appropriate cases where the cost to individual liberty is simply too great.

The Courts also engage in an exercise of balancing rights in applying the remedial provisions of Section 24 of the Charter. Section 24(1) permits anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied to apply to a Court of competent jurisdiction to obtain a remedy which the Court may consider appropriate and just.¹⁵² The further right to

¹⁵² For a general discussion of the application of the remedial provisions of the Charter see Gibson, supra, note 136, ch. VI.

have evidence obtained in contravention of the Charter excluded is provided by Section 24(2) as follows:

24(2) Where, in proceedings under subsection (1), a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In deciding whether the admission of evidence in a given case would "bring the administration of justice into disrepute" often entails a delicate balancing of the fundamental rights of the accused against other considerations with more utilitarian characteristics. The principles to be applied in determining whether the admission of evidence would bring the administration of justice into disrepute and the identification of factors which should be taken into account in making this determination have been discussed in a number of cases. In R. v. Therens,¹⁵³ Mr. Justice Le Dain took into account:

" ... the relative seriousness of the constitutional violation ... in light of whether it was committed in good faith or was inadvertent or was merely of a technical nature, or whether it was deliberate, willful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or a necessity to prevent the loss or destruction of the evidence."

153 [1985] 1 S.C.R. 613.

Other factors which are relevant to the determination include the nature of the evidence obtained as a result of the violation and the availability of other investigative techniques.¹⁵⁴ In Collins v. The Queen,¹⁵⁵ the Court stated that real evidence which is obtained in a manner that violates Charter rights rarely operates to bring the administration of justice into disrepute for that reason alone since real evidence exists notwithstanding the Charter violation.¹⁵⁶ Such situation is to be contrasted with a case where, as a result of a Charter violation, an accused provides incriminating evidence either by means of a confession or other evidence obtained from him. The use of evidence obtained from the accused in this manner is more likely to render a trial unfair since it did not exist prior to the Charter violation and offends the right against self-incrimination.¹⁵⁷

Evidence obtained by means of violations which relate more to form than to substance are, as a general rule, not considered by the Court to be violations that bring the administration of justice into disrepute. In R. v. Sieben,¹⁵⁸ for example, the Supreme Court of Canada declared that legislation authorizing writs of assistance violated Section 8 of the Charter, but went

¹⁵⁴ Collins v. The Queen (1987), 33 C.C.C. (3d) 1 (S.C.C.).

¹⁵⁵ Ibid.

¹⁵⁶ Ibid., at p. 9. See also R. v. Black (1989), 70 C.R. (3d) 87 (S.C.C.).

¹⁵⁷ On this point see Therens, supra note 153 and Clarkson v. The Queen, [1986] 1 S.C.R. 383.

¹⁵⁸ (1987), 74 N.R. 271 (S.C.C.).

on to hold that evidence which had been gathered pursuant to the writ in question should not be excluded under Section 24(2). There were reasonable grounds for the search, it was carried out in a reasonable manner and the officers in question believed in good faith that the writ authorizing the search was valid. An opposite conclusion was reached in Genest v. The Queen¹⁵⁹ because defects in the warrant were apparent from the face of the warrant and the search was carried out with excessive force.

The principle which can be extracted from the cases under Section 24(2), and particularly from the useful summary of the relevant factors set out in the Collins decision, is that whether evidence obtained by means which offend Charter rights should be excluded is dependent on the outcome of a balancing of rights-based factors (the effect the admission of the evidence would have on fairness, the seriousness of the violation and the reasons for the violation) against more utilitarian-based considerations (the seriousness of the offence, availability of other investigative techniques, the urgency of the circumstances in which the evidence was obtained). In some cases, therefore, the balancing exercise and a consideration of utility-based factors will lead to a decision to admit evidence even where such evidence has been obtained by means which violate an accused's Charter rights.

159 (1989), 67 C.R. (3d) 224 (S.C.C.).

(b) Balancing Rights vs. Utility - A New Approach?

Given the incompatibility of the majoritarian focus of utilitarianism and the individualistic orientation of the environment created by the Charter it is somewhat alarming to note that the Supreme Court of Canada in a number of relatively more recent cases appears to have departed from a pure "rights-based" approach in carrying out the balancing exercise under section 1 of the Charter and has infused the balancing equation with a consideration of factors which most would characterize as "utility-based".

This departure from a pure "rights-based" approach (in which rights are balanced against rights) and a movement towards a more utility-based approach may be illustrated by an examination of two Supreme Court of Canada cases dealing with the power of police to randomly stop motor vehicles. In R. v. Hufsky¹⁶⁰ the appellant was stopped during a random spot check conducted by the police for the purpose of checking mechanical fitness and sobriety of drivers as well as driver's licenses and insurance certificates. Whether a particular vehicle should be stopped was within the discretion of the police officer on duty. The appellant was stopped at a random spot check. There was no irregularity in the manner in which the appellant had been driving. The appellant provided the police officer with his

160 [1988] 1 S.C.R. 621.

driver's license and proof of insurance at which time the officer noticed the smell of alcohol on the appellant's breath. The officer requested that the appellant provide a sample of his breath. The appellant refused and was consequently charged and convicted in Ontario Provincial Court of failing to provide a breath sample.

The guilty verdict was upheld by the County Court and by the Court of Appeal. A number of constitutional issues were raised in the appeal to the Supreme Court of Canada. Of the issues raised, the most interesting for the purposes of this Paper is the question of whether random stopping of motor vehicles by police officers (pursuant to some statutorily derived right) infringes the right guaranteed under section 9 of the Charter not to be arbitrarily detained and, if so, whether the detention is justified under section 1 of the Charter.

The judgment of the majority of the Court was delivered by Mr. Justice Le Dain who concluded that the appellant had been arbitrarily detained. The question which then arose for determination was whether the authority to stop motor vehicles conferred by sub-section 189a(1) of the Ontario Highway Traffic Act¹⁶¹ constitutes a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society. The Court stated that the test to be applied in making this

161 R.S.O. 1980, c. 198, as am.

determination is the test formulated in R. v. Oakes¹⁶² and went on to note that ten volumes of material had been placed before the Court to support the Crown's contention that the random stops in question were demonstrably justified under section 1. This wealth of material included, inter alia, provincial government reports containing statistical analysis of motor vehicle accidents, motor vehicle offences and claims made against the Motor Vehicle Accident Claim Fund, as well as charts which collated the statistical data and which, the Crown submitted, constituted justification for the police random stop authority.

The Court noted that the material filed:

"... reinforces the impression of the gravity of the problem of motor vehicle accidents in terms of the resulting deaths, personal injury and property damage, and the overriding importance of the effective enforcement of the motor vehicle laws and regulations in the interests of highway safety."¹⁶³

In light of these observations, the Court concluded as follows:

"In view of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving, I am of the opinion that the limit imposed by s. 189a(1) of the Highway Traffic Act on the right not to be arbitrarily detained guaranteed by s. 9 of the Charter is a reasonable one that is demonstrably justified in a free and democratic society. The nature and degree of the intrusion of a random stop for the

¹⁶² Supra, note 144.

¹⁶³ Ibid., at p. 636.

purposes of the spot check procedure in the present case ... is proportionate to the purpose to be served."¹⁶⁴

A similar result was reached on comparable facts in R. v. Ladouceur.¹⁶⁵ In that case, the appellant was stopped by police in a random spot check authorized by the same section of the Ontario Highway Traffic Act¹⁶⁶ that was relied on in the Hufsky¹⁶⁷ case. The appellant was stopped randomly and, after inspection by the police of his papers, was charged with driving while his license was suspended. The appellant was convicted at first instance by a Justice of the Peace. The conviction was upheld by the Provincial Court and by the Ontario Court of Appeal. On further appeal to the Supreme Court of Canada, the appellant challenged his conviction on the basis that the statutory provision which authorized the random stop violated sections 7, 8 and 9 of the Charter and that such violation was unjustified under section 1.

The majority judgment was delivered by Mr. Justice Cory who was satisfied that the random stop constituted an arbitrary detention in violation of section 9 of the Charter. The Court stated that no "seizure" had taken place and that it could not therefore be said that section 8 had been violated. In the

¹⁶⁴ Ibid.

¹⁶⁵ [1990] 1 S.C.R. 1257.

¹⁶⁶ Supra, note 161.

¹⁶⁷ Supra, note 160.

circumstances, the Court did not find it necessary to consider whether the random stop procedure infringed section 7.

The issue for determination was whether the section 9 violation was justified under section 1, which section in the Court's words:

"... requires the courts to attempt to achieve a proper balance between the fundamental rights of the individual and the legal restrictions which may be placed on those rights for the benefit of society as a whole."168

Mr. Justice Cory restated the Oakes test and concluded that there could be no question that the legislation in question deals with a pressing and substantial concern. Statistical evidence filed by the respondent corresponding to motor vehicle deaths and injuries, as well as the extent and dollar value of property damage resulting from motor vehicle accidents satisfied the court of the validity of the pressing and substantial nature of the concern. The statistics led by the respondent led the Court to conclude that:

" ... society as a whole has an interest in reducing the cost of medical, hospital and rehabilitation services which must be provided to accident victims and in minimizing the emotional damage suffered by the victims' families. Surely the preventive medication of requiring drivers to stop provided by s. 189a(1) is preferable to the incurable terminal tragedy represented by the fatal accident victim and the permanently disabled victim. Surely it must be better to permit the random stop and prevent the accident

168 Ibid., at p. 1278.

than to deny the right to stop and repeatedly confirm the sad statistics at the morgue and hospital."169

On the basis of the material filed, the majority of the Court was satisfied that the legislative enactment under scrutiny was designed to meet a "pressing and substantial concern" and that fiscal constraints and shortages of police personnel made it readily apparent that there was a natural connection between random stop checks and the goal of the legislative provision. In sum, routine checks were considered by the Court not to trench upon the section 9 right severely enough to outweigh the legislative objective of the statutorily-derived power. The power was therefore upheld as an infringement on individual rights that is demonstrably justified in a free and democratic society.

What is disappointing about these two judgments is not so much the result that was reached, but rather the way the result was arrived at. The Court was quick to embrace utilitarian factors such as the difficulties in detecting motor vehicle offences and the hardships caused by personal injury and property damage and trivialized the nature of the intrusion on the rights affected. Utility-based factors were injected into the balancing equation and governed the outcome of the section 1 balancing exercise by strongly countervailing the "rights-based" considerations. In effect, the Court short-circuited the process of dealing with each of the criteria enunciated in the Oakes test

169 Ibid., at pp. 1282-1282.

and permitted the rights of the individual accused to be overridden by the broad public interest in preventing accidents. The Court balanced the fundamental rights of the accused against utilitarian considerations such as the desire to save costs associated with highway deaths and injuries, the desire to prevent property damage and the practical and fiscal difficulties faced by police in detecting the sorts of crimes which the random stop power permitted them to uncover.

The difficulty, from a conceptual point of view, is that these two judgments place individual rights in a position of competition with broad utility-based concerns such as public safety and fiscal restraint which, by their nature, are easily proven in court and tend to provide significantly more popular and compelling reasons for adopting one position over the other. If individual rights are forced to compete on an equal footing with utilitarian considerations, it is submitted that only rarely will the rights of a single individual come out ahead. In order for the balancing process to accord with the environment created by the Charter, it is essential for rights to be balanced against rights. In a competition between individual rights and utility, utility will invariably be the victor since utility is comprised of the rights of society in the aggregate. Adopting the approach exemplified by the majority judgments in Hufsky and Ladouceur will, almost invariably, lead to a result which may be "right" from a public policy point of view but which is "right" for the

wrong reasons and does not accord with a "rights-based" approach to the interpretation of Charter values.

(c) The Minority View - A Principled Approach

In searching for a principled approach to the task of balancing the various interests involved and in determining whether legislatively sanctioned impositions on individual rights are justified in the modern constitutional context, the minority judgment in Ladouceur delivered by Mr. Justice Sopinka on behalf of Chief Justice Dickson, Madame Justice Wilson and Mr. Justice La Forest has much to commend it. The minority of the Court accepted that the random stop constituted an arbitrary detention and violated section 9 of the Charter. However, in going on to consider whether the infringement on Charter rights was justified under section 1, the Court began the balancing exercise with a recognition that the police were seeking to add the organized spot check to the "balance on the side of law enforcement" stating that:

" ... it is crucial for the Crown to persuade the Court that this unrestricted power is a necessary addition to the impressive array of enforcement methods which are available."¹⁷⁰

The Court noted that random spot checks permit a police officer to stop any vehicle at any time and for any reason. Some officers, the Court considered, may be motivated to stop young

¹⁷⁰ Ibid., at p. 1266.

drivers, old cars or drivers of a particular race. Such unlimited power has the potential for being much more intrusive and a much greater cause for invasions of privacy than random pre-organized check points such as those carried out in connection with the R.I.D.E. programme. Such check points are truly random and are based on objective criteria.

The Court also considered that the random spot check power being sought by police would likely cause in excess of thirty-seven innocent motorists to be stopped for each motorist found to have committed a driving offence. The voluminous materials filed by the respondent were regarded with some skepticism by the Court since the evidence failed to address questions such as the percentage of accidents avoided by the utilization of the random stop power.

The Court regarded the burden upon the state to justify the expansion of exceptional police powers as an extremely heavy one and restated the requirements that a limit on fundamental rights must meet in order to be justified under section 1, namely that it be: (1) reasonable; (2) prescribed by law; and (3) demonstrably justified in a free and democratic society.¹⁷¹ On the basis of the material before the Court, the majority was of the view that the limit failed to satisfy either (1) or (3) and that it could not therefore be upheld under section 1.

¹⁷¹ Ibid., at p. 1264.

The difference between the majority and minority views in Ladouceur lies primarily in the point from which they began the balancing exercise. The majority essentially began from the premise that the intrusion on rights was minimal and itself assumed the task of justifying the intrusion on the basis of considerations reflecting strong utilitarian underpinnings. The minority position, on the other hand, began the exercise from the premise that the police power at issue represented a serious intrusion on individual rights, discounted the utility-based considerations which were introduced in evidence and adhered to a pure "rights-based" approach.

This dichotomy is symptomatic of the problem which faces the courts in assessing the constitutional validity of existing legislation and also reflects the problem which faces law reformers in examining whether current laws are in accord with entrenched fundamental rights and in advocating proposals for reform. The chapters following will examine in some detail the extent to which the Law Reform Commission has attempted, with varying degrees of success, to utilize Bentham's utility theory as a model for criminal law reform and address the question of whether the utility model can ever serve as an appropriate yardstick against which to measure existing laws and generate reform proposals.

PART TWO: THE INFLUENCE OF BENTHAMITE UTILITARIANISM
ON THE WORK OF THE LAW REFORM COMMISSION OF
CANADA IN THE AREA OF SUBSTANTIVE CRIMINAL
LAW - AN EXAMINATION OF THE INAPPROPRIATENESS OF
THE UTILITY MODEL

The process of criminal law reform involves two distinct levels of inquiry. In critically examining a law or set of laws and generating proposals for reform, the law reformer must (whether consciously or unconsciously) address two questions- (1) what acts or omissions should constitute crimes (i.e., should there be a law against activity X) ?; and (2) if an activity or omission should be a crime, what form should a law against that activity or omission take?¹⁷² In seeking answers to both of these questions the Law Reform Commission of Canada

¹⁷² The answer to question (1) will often be obvious such that no conscious deliberation of the answer will be required. For example, if the law under scrutiny is a law which prohibits the taking of human life or the stealing of another's property, the threshold question would not be one that would need to be agonized over, or indeed, even specifically addressed. It is not surprising therefore that in many of the Commission's publications, the threshold question of whether or not there should be criminal sanctions against a certain type of behaviour is not directly addressed. In other cases, however, the answer to the first question may not be quite so obvious but it may suffice to simply raise the question and to deal it away in a very cursory fashion. For example, in Working Paper #49 Crimes Against the State (Ottawa: Supply and Services, 1986) the Commission briefly discussed the rationale for the continued existence of crimes against the state and purported to rely on the theory of Jeremy Bentham and the utilitarians in support of the retention of such crimes. (p. 43)

has, on a number of occasions, resorted to and attempted to apply Jeremy Bentham's principle of utility.

It should not be surprising to find that Canada's law reform agency has looked, on occasion, to Bentham for guidance. Bentham is, after all, credited by many writers as being the spiritual father of modern law reform.¹⁷³ However, it is the purpose of this Chapter to illustrate by closely examining the Commission's proposals in a number of areas that traditional Benthamite utilitarianism represents an inappropriate philosophical framework within which to criticize the existing law and to formulate proposals for criminal law reform in modern Canadian society.

At first blush it may seem incongruous to suggest that, at least in general terms, "the greatest happiness for the greatest number" is an undesirable philosophical premise from which to undertake the reform of the law. To most, the greatest happiness for the greatest number of individuals in society would be a highly desirable public policy objective. As is evident from the discussion in the preceding Chapter, the

¹⁷³ See for example, N. Grundstein, "Bentham's Introduction to the Principles of Morals and Legislation", supra note 72; Speeches of Lord Brougham, supra note 74; Sir Henry Maine, Early History of Institutions, supra note 73. For further background on Bentham's contributions to law reform see, Mary Mack, Jeremy Bentham: An Odyssey of Ideas 1748-1792, supra note 11; C. Phillipson, Three Criminal Law Reformers, supra note 11.

problem with utilitarianism is not so much that it proceeds from a faulty premise, but rather that the utilitarian perspective is so narrow and so confined by informational blinders¹⁷⁴ that it cannot provide a meaningful assessment of all of the factors which must be taken into account by the modern legislator or law reformer. Put simply, the failing of utility theory lies not in what it considers to be important but rather in what it considers to be unimportant - factors such as values, morals and individual rights.¹⁷⁵

It should be noted at this juncture that there is a lack of consensus in the academic literature as to the proper characterization of the ideology underlying the Commission's thinking and work. Professor Goode, for example, has suggested that the Commission has adopted a "value-consensus" model which reflects the way that the Commission perceives the relationship between society and social authority.¹⁷⁶ According to Goode's analysis, the value-consensus model is characterized by two essential premises:

174 See supra, chapter 2, part (c).

175 The failure of Bentham's utility theory to consider the importance of factors such as these is discussed supra, chapter 2, part (d).

176 See M.R. Goode, "Law Reform Commission of Canada-Political Ideology of Criminal Process Reform" (1976), 54 Can. Bar Rev. 653.

" ... that there exists in society a fundamental agreement as to the values which the society wishes, in some way, to uphold: and that consensus is reflected in the law making, law applying and law interpreting practices of political authority."177

This value-consensus model encompasses the notion that coercive state authority flows from "the consensus among the members of society about the most desirable aspects of that society"178 and results in a social contract whereby all members of society exchange their personal liberty in return for security preserved by the use of authoritative force by the state. As Goode observes, this social contract leads to egalitarianism and the perceived right of the state (to whom individuals have surrendered their liberty) to intervene by legislative action or other means to advance the interests of everyone.

From his exposition of the Commission's philosophical underpinnings Goode concludes that its liberal-positivist roots and corresponding value-consensus orientation provides an inappropriate model for reforming Canada's legal regime because it fails to account for the fact that modern society is characterized by conflict and diversity. To Goode, the Commission's approach merely serves to validate the continued existence of the status quo and to protect and perpetuate the

177 Ibid., at p. 657.

178 Ibid., at p. 658.

interests of the dominant majority. This critical view is shared by Professors Hastings and Saunders¹⁷⁹ who, in their examination of Working Paper #29,¹⁸⁰ suggest that the Commission:

"... offers vague notions of common sense and community standards in lieu of a theory of law and legal reform, and it forgoes the option of developing new approaches to the law which might be 'responsive to the changing needs of modern Canadian society and of individual members of that society.'¹⁸¹ The result is that it contributes to an ideology which seeks to manufacture public consent to and support of the current framework of social relations."¹⁸²

The value-consensus model is also deficient, claims Goode, because the model fails to recognize that there can be no consensus as to "core values" in society and the adherence of the Commission to the model renders its recommendations in areas of the law dealing with morality weak and unconvincing.¹⁸³

¹⁷⁹ See "Ideology in the Work of the Law Reform Commission of Canada: The Case of the Working Paper on the General Part" (1983), 25 Crim. L.Q. 206.

¹⁸⁰ Law Reform Commission of Canada, The General Part: Liability and Defences (Working Paper #29) (Ottawa: Supply and Services Canada, 1982).

¹⁸¹ Law Reform Commission Act, R.S.C. 1970, c. 23, (1st Supp.), s. 11(d) (now R.S.C. 1985, c. L-7).

¹⁸² Hastings and Saunders, supra note 179, at pp. 221-222.

¹⁸³ See Goode, supra note 176, at pp. 671-672. On this point see also Hastings and Saunders, supra note 179, at pp. 221-222 wherein they suggest that the Commission's approach

Goode's analysis and criticism of the Commission's underlying ideology has been challenged by Professors Barnes and Marlin who have engaged Goode in an academic sparring match.¹⁸⁴ Barnes and Marlin, in their reply to Goode, do not propound that the Commission's ideology should be characterized as other than "value-consensus" in its orientation. However, they do dispute Goode's conclusion that the Commission assumes there to be a consensus on all issues and suggest that the Commission's approach is an appropriate one:

"In its enquiries, the Commission has taken the optimistic position that consensus should be sought, even if the consensus is merely agreement to differ.

...

Assuredly, consensus is not the whole story. The majority, even a very large majority, is not always right. Intellectual leaders have always the duty to speak out against mass prejudices enshrined in the criminal law. But while the Commission may be faulted for giving insufficient expression to the limitations on consensus in its published writings, it could hardly be taken to

would be more defensible if they could prove the existence of homogeneous community standards across Canada.

¹⁸⁴ Barnes and Marlin reacted to Goode's 1976 article in "Radical Criminology and the Law Reform Commission of Canada—A Reply to Professor M.R. Goode" (1974), 4 Dalhousie Law J. 151. Goode in turn responded in his article entitled "The Law Reform Commission of Canada, Barnes and Marlin, and the Value-Consensus Model: More About Ideology" (1977-78), 4 Dalhousie Law J. 793.

hold a consensus-is-everything philosophy."185

It is the author's contention that overall the Commission's work in past years has reflected a strong utilitarian perspective but that a close examination of specific recommendations in diverse areas reveals that the Commission has been influenced by a number of different ideological and philosophical attitudes. This is natural because the Commission's papers are written by a multitude of individual consultants and are subjected to the scrutiny and approval of a Board comprised of appointees whose membership changes on a regular basis as governments change. Some of the Commission's consultants are employed in-house and work on a particular project as part of a larger consultation team. Others are hired as external consultants and work, to a large extent, as independent contractors. Naturally, all papers produced by researchers for the Commission are exposed to a broad based process of consultation whereby the recommendations are reworked and revised in response to views expressed by the general public and by representatives of various groups186 which form part of the Commission's external review panel.

185 Barnes and Marlin, " Radical Criminology", ibid., at pp. 154-155.

186 These groups include the Canadian Association of Law Teachers (C.A.L.T.), the Canadian Association of Chiefs of Police (C.A.C.P.) and the government group which includes representatives of the governments of each of the provinces as well as from the federal Department of Justice and the Ministry of the Solicitor General.

Ultimately, all papers must be voted upon and approved by the Commission sitting as a body. If there is a flux or tide in the characterization of the ideology which is expressed in the work of the Commission it is, in the author's view, fairly readily explained by the fact that the Commission is no more than a collection of individuals. As the membership of the Commission changes and the composition of its research staff fluctuates, it should not be surprising to find that coincident changes in the ideology or philosophy expressed in its work occur.

None of this alters that fact that the Commission has, on a number of occasions, looked to Jeremy Bentham's principle of utility for guidance in assessing whether a law or set of laws should be retained or repealed. In these situations the application of the utility principle has occasionally led to an inappropriate result. In other cases, the shortcomings of pure utilitarian methodology have led the Commission to make suitable modifications to the utility quotient in order to bring their recommendations into line with modern social realities. The pages following will explore the utilitarian underpinnings of the Commission's proposals on the subject of the scope and function of criminal law in Canada as well as its recommendations on the topics of obscenity, the defence of

necessity, hate propaganda, and the imposition of a duty to rescue.

CHAPTER FOUR - THE SCOPE OF THE CRIMINAL LAW

In Our Criminal Law,¹⁸⁷ the Commission's first Report to Parliament in the criminal law field, the Commission pursued a general framework within which to identify the types of acts and omissions that should be labelled "real crimes". In that Report, the Commission also undertook to explore and identify the philosophical bases of criminal law which should guide its future efforts at formulating proposals for the reform of the law in modern Canadian society.¹⁸⁸

Upon its formation in 1971, the Commission was instructed by the terms of its enabling statute,¹⁸⁹ to remove anachronisms and anomalies in the law, to eliminate obsolete laws and to develop new approaches to and new concepts of the law in keeping with and in response to the changing needs of modern Canadian society and of individual members of that society.¹⁹⁰ From the outset, one of the Commission's assigned priorities was the area of criminal law with the Minister of Justice in

187 (Report #3) (Supply and Services Canada, 1977).

188 For an overview of the parameters of this exercise see Report #3, ibid., at pp. 15-18.

189 Law Reform Commission Act, supra note 181.

190 Ibid.

1971 instructing the Commission to undertake "a deep philosophical probe of the whole criminal law of Canada."

In Our Criminal Law, the Commission attempted to map out a course for future efforts at criminal law reform by conducting a philosophical examination of the fundamental values to be expressed in Canadian criminal law and by seeking to define the appropriate role of criminal law in modern society. Our Criminal Law was the subject of extensive consultation and, in 1982, was adopted by the federal government "as the starting point for criminal law reform and as the basis of our criminal justice policy." 191

The recurring theme evident from a review of Our Criminal Law is one of restraint.¹⁹² To the Commission, the criminal law should be regarded as an instrument of last resort. In their words, the criminal law "needs to be restricted to its proper target where it is most effective. We must use it with

191 Law Reform Commission of Canada, Recodifying Criminal Law (Report #30) (Ottawa: Supply and Services Canada, 1986), at p. 1. The Commission is referring here to the publication of the federal Department of Justice entitled The Criminal Law in Canadian Society (Ottawa: Supply and Services Canada, 1982) which described the process of the Criminal Law Review and which was "aimed at providing a basic framework of principles" for review of criminal law and criminal justice policy.

192 The Commission views the criminal law as society's ultimate weapon - a weapon which "must stay sheathed as long as possible." Our Criminal Law, supra note 187, at pp. 27-28.

restraint."193 In furtherance of this principle of restraint the Commission recommended that the ambit of the criminal law should be severely restricted and proposed the adoption of the following test for assessing whether the inherent criminality of a given act warrants the act being made a real "crime":

- (1) - does the act seriously harm other people?
- (2) - does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- (3) - are we confident that the enforcement measures necessary for using the criminal law against the act will not themselves seriously contravene our fundamental values?
- (4) - are we satisfied that the criminal law can make a significant contribution in dealing with the problem? 194

According to the Commission's test, only if the answer to the above four questions is "yes" should the conduct in question be prohibited as a criminal offence.

If the questions enumerated in (1) through (4) above are read conjunctively, the Commission seems to be suggesting that conduct should only qualify as a "true" crime if the harm to society represented by the conduct under review outweighs the

193 Ibid., at p. 31.

194 Ibid., at p. 33.

harm that arises through the use by the State of criminal sanctions. The reasoning underlying this view is stated to be that there are enormous costs inherent in having a law against something - the criminal law should intervene only in cases where the costs inherent in making and enforcing a law are justified by the degree of potential harm to society which is represented by the conduct being prohibited.¹⁹⁵ In the Commission's words:

"After all, every time we have a law against something, we do so at a cost. That cost is four-fold. Offenders pay through being prosecuted, convicted, punished. Other individuals pay through having their freedom restricted. We all pay through having to foot the bill for law enforcement. Finally, society pays, in some cases, by wrongly thinking criminal law has solved the problem and by consequently not getting properly to grips with it. So criminal law must be confined to matters where this fourfold price is justified - in short, to matters where criminal law can have some worthwhile impacts."¹⁹⁶

This exposition concerning the proper role of criminal law in contemporary Canadian society clearly reflects several fundamental characteristics of utilitarian criminal theory and exhibits a striking resemblance to certain of Bentham's own

195 Ibid., at pp. 33-35.

196 Ibid., at p. 19.

criteria for the imposition of criminal punishment.¹⁹⁷ To Bentham, punishment would be unwarranted in a number of situations including:

- (1) - where no harm has been caused to anybody by the act in question;¹⁹⁸
- (2) - where the harm caused by the imposition of the punishment outweighs the harm caused by the conduct;¹⁹⁹
- (3) - where the conduct can be effectively restrained by some other less expensive means.²⁰⁰

The exercise engaged in by the Commission of balancing the harm caused by the conduct in question against the costs occasioned to society by having a law to prohibit and punish such conduct is patently utilitarian in approach. In attempting to define the type of conduct that should attract criminal sanction, the Commission begins with a balancing of the utility equation. In

¹⁹⁷ See Principles of Morals and Legislation, supra note 7, Ch. XIII.

¹⁹⁸ In Bentham's words, "[w]here there has never been any mischief: where no mischief has been produced to anybody by the act in question." Ibid., at p. 159.

¹⁹⁹ As Bentham explains, punishment is unprofitable where "on the one hand, the nature of the offence, on the other hand, that of the punishment, are, in the ordinary state of things, such, that, when compared together, the evil of the latter will turn out to be greater than that of the former." Ibid., at p. 163.

²⁰⁰ To Bentham, the imposition of criminal punishment would be unwarranted where "the purpose of putting an end to the practice may be attained as effectually at a cheaper rate." Ibid., at p. 164. Frugality as a desirable end of punishment is also discussed at some length in Chapter XIV.

order for the existence of a criminal prohibition to be justified, the balancing of the relative harms must favour the imposition of such a prohibition.

At this initial stage, the Commission's approach is consistent with and reflects certain of Bentham's views in favour of a more restrained use of criminal sanctions under the law.²⁰¹ Bentham considered that "[a]ll punishment is mischief; all punishment in itself is evil."²⁰² Bentham too would have agreed that the existence of a criminal prohibition, with all the hardship caused to society by having and enforcing such a prohibition, must be justified on the basis that such hardship is outweighed by the harm to society that would result from not prohibiting the conduct in question. In fact, components (1), (3) and (4) of the Commission's test coincide almost exactly with the three propositions set out above which are derived from Bentham's writings on the topic of cases warranting punishment.

On further examination of the Commission's proposals it becomes apparent that the Commission's perspective on

²⁰¹ Bentham's views on the use of restraint in the creation of crimes and the imposition of punishment permeate many of his writings but these views are succinctly expressed in Chapters XIII and XIV of his Principles of Morals and Legislation.

²⁰² The Principles of Morals and Legislation, ibid., at p. 158.

criminality as expressed in Our Criminal Law does not coincide exactly with Bentham's utilitarian theory, primarily because the Commission does not begin the balancing exercise from a value-neutral perspective. Rather the Commission has adapted Bentham's utility quotient by interjecting a moral or value-oriented component at a preliminary point in the balancing exercise. Where the Commission has departed from Bentham's theory is: (a) in the addition of consideration (2) to its criminality test; and (b) by the regard for values which may possibly be violated in the exercise of enforcement measures.

Unlike Bentham, the Commission has stated that conduct may properly be considered to be a crime, not only if it causes serious harm to another, but also if it seriously contravenes fundamental values. In this important respect, the Commission's approach contrasts sharply with Bentham's utilitarian model which purports to assess conduct from a moral-neutral or value-neutral point of view and proceeds from the premise that men are essentially rational beings acting in their own self-interest. The Commission specifically rejected "the simple Benthamite view of human beings as mechanistically rational and motivated solely by principles of pleasure and pain".²⁰³

²⁰³ Our Criminal Law, supra note 187, at p. 38.

In effect, the Commission has used Bentham's model as a starting point but has recognized, and rightly so, that the criminal law cannot be based on such a simplistic view of the nature of men. Humans are not governed by mechanical notions of pleasure and pain. Rather, they hold morals and values which morals and values must be reflected in the criminal law.²⁰⁴ The recognition by the Commission that laws cannot exist in a moral or value vacuum is evident from their statement that:

"Man is a social being who has to live in a society. Society means co-operation, a common life, a sharing of fundamental values. To hold a value sincerely, a person must react when it is violated. To share a fundamental value genuinely, society too must react publicly when it is violated, condemn the violation and take steps to reaffirm the value. One way of doing this is by the criminal law.

...

In re-affirming values criminal law denounces acts considered wrong. Accordingly it has to stick to really wrongful acts. It must not overextend itself and make crimes out of things most people reckon not really wrong or, if wrong, merely trivial. Only those acts thought seriously wrong by our society should count as crimes." ²⁰⁵

²⁰⁴ "As long as human beings remain the sort of creatures they are, they will hold moral values and they will also transgress them. Crime is part of our divided nature." Our Criminal Law, *ibid.*, at p. 39.

²⁰⁵ Our Criminal Law, *ibid.*, at pp. 27-28. The Commission's position that there exists some undefined set of fundamental values which is shared by society as a whole and which should be protected by the criminal law has been questioned by some authors. Professor M. R. Goode has

In this fashion, the Commission has recognized that the value-neutral perspective of utilitarian methodology renders it incapable of providing a meaningful assessment of the relative deservingness of competing claims.

The Commission also departed from Bentham's utility theory by using negative effects on fundamental values as a limit on enforcement measures. According to the Commission's proposed criminality test, in order for conduct to qualify as a "real crime" the enforcement measures necessary for invoking the criminal law must themselves not seriously contravene fundamental values. This important qualification to the criminality test is consistent with the principle derived from recent Charter cases to the effect that the greatest good for the greatest number must often be sacrificed in favour of the protection of the individual where fundamental rights are involved. By way of example, in Southam v. Hunter,²⁰⁶ the Supreme Court struck down a provision of a federal statute authorizing searches and seizures by government investigators on the basis that, although the search and seizure power served a legitimate government objective, the statutory standard for

criticized the Commission for proceeding from what he has labelled a "value-consensus model" on the basis that there does not exist any consensus in society on the question of what are, or should be, fundamental values, supra notes 176 and 184.

206 Supra note 132.

validating the intrusion was too low and the negative impact on the rights of the individual subject to the search and seizure too severe.

Similarly, in R. v. Noble,²⁰⁷ the Ontario Court of Appeal held that a section of the Narcotic Control Act authorizing police to enter and search a dwelling-house at any time under the authority of a writ of assistance to violate section 8 of the Charter and therefore to be of no force or effect. The Court took into account that the detection and suppression of drug traffic is particularly difficult for law enforcement officers and that an appropriate balance between the competing interests of effective law enforcement and the right of an individual to be free from unwarranted intrusions is difficult to achieve and to maintain. Notwithstanding these considerations, the Court concluded that:

" ... particular obstacles encountered by law enforcement officers in the investigation of drug crimes is, of course, a factor to be taken into account in determining whether the powers of search or seizure conferred by Parliament in relation to the enforcement of legislation with respect to dangerous drugs are reasonable. It is self-evident, however, that the particular obstacles confronting law enforcement officers in the field of drug crimes cannot justify the granting of powers of search or seizure which are unreasonable in their extent and contravene the constitutional standard of reasonableness prescribed by s. 8 of

207 Supra, note 138.

the Charter."208

In other words, the greater good represented by the advantages to law enforcement served by the legislated search and seizure powers must be sacrificed in favour of the protection of fundamental individual liberties.

In the context of Our Criminal Law,209 although the Commission utilized a relatively pure utilitarian model in formulating general rules for deciding what types of conduct should be classified as "real" crimes worthy of criminal sanction, it found it necessary to depart significantly from Bentham's utility quotient by making appropriate modifications in order to take into account effects on fundamental freedoms rights and to bring utility theory into line with modern standards.

208 Ibid., at p. 657.

209 Supra note 177.

CHAPTER FIVE: OBSCENITY

The issue of obscenity was one of the first specific areas in which the Commission undertook an assessment of the question of whether the criminal law should continue to prohibit a given behaviour or activity.²¹⁰ Working Paper #10, Limits of Criminal Law: Obscenity a Test Case²¹¹ was published in 1975 and questions the proper scope of the criminal law in modern Canadian society by focusing on the issue of obscenity. As the Commission stated in the foreword to that Paper:

"Our examination of obscenity law is really intended to search out the reasons that justify the use of criminal law. What are the things that criminal law can justifiably be used against? In a word the specific problem of obscenity is used to throw light on a larger and much deeper problem - that of charting the limits of the criminal law."²¹²

210 For some background on obscenity and pornography generally see L. Lederer (ed.), Take Back the Night: Women on Pornography (1980); S. Brownmiller, Against Our Will (1976); S. Griffin, Pornography and Silence (1981). Probably the most comprehensive recent reference work on the topic in the Canadian context is the Report of the Special Committee on Pornography and Prostitution, Pornography and Prostitution in Canada (1985)(the Fraser Committee Report).

211 (Ottawa: Supply and Services Canada, 1979) (Working Paper #10).

212 Ibid., at pp. 1-2.

The Commission in the Working Paper began by undertaking an assessment of some of the costs to society in having and enforcing laws against obscenity and, in true Benthamite fashion, balanced these costs against the possible "harms" represented by obscenity that might be considered to provide a valid justification for making obscenity a target of criminal sanction.²¹³

Ian Hunter has summarized the Commission's approach in Working Paper #10 as beginning with the recognition that the use of the criminal law to deal with a social problem "has a three-fold cost: (a) to those convicted - punishment; (b) to the law-abiding members of society - diminution of human liberty ...; and (c) to the general tax-paying public - the cost of enforcement."²¹⁴ In order to justify the imposition of these costs, Hunter explains that according to the Commission's approach, it must be established that "(a) a problem, of serious proportion, exists; (b) that, absent criminal proscription, harm will be caused; and (c) that the anticipated

²¹³ For some commentaries on Working Paper #10 see Ian Hunter, "Working Paper #10: Limits of Criminal Law: Obscenity: A Test Case" (1976), 8 Ottawa Law Rev. 299; R. Murrant, "Limits of Criminal Law" (1976), 8 Ottawa Law Rev. 317; P.J.T. O'Hearn, "Limits of Criminal Law: A Reaction" (1976), 8 Ottawa Law Rev. 310. Also of interest, though not specifically as a commentary on Working Paper #10, is Ian Hunter, "Obscenity, Pornography and Law Reform" (1975), 2 Dalhousie L.J. 482.

²¹⁴ Hunter, Working Paper #10, supra at p.300.

benefits of criminal proscription and enforcement outweigh the social cost."²¹⁵

According to Bentham's theory, this process of identifying and quantifying the factors on each side of the equation should permit the law reformer to determine where the appropriate balance of interests lies. In the context of obscenity, does it favour those who wish to be free to view obscenity or does it favour those who wish to be protected from exposure to obscene materials? In sum, having regard to all the circumstances, is it worth using the criminal law against obscenity?²¹⁶

The answer to this question, the Commission concluded, could only be found by assessing the utility consequences of each of the alternatives. The alternative to be preferred is the alternative which interferes least with the interests of other members of society:

"Where one man's aim is incompatible with another's, isn't the aim that should prevail the one that least conflicts with other aims? Suppose I want to fish, you want to waterski, the lake's too small for both. If fishing is compatible with other activities, like swimming, paddling, boating and so on, but water-skiing rules out all other activities, then shouldn't my aim - fishing - take

²¹⁵ Ibid., at p. 301.

²¹⁶ Working Paper #10, supra note 211, at p. 40.

precedence ? Giving priority to the aim compatible with the greatest range of alternative aims is simply maximizing freedom: other things being equal, it leaves the greatest number of people free to pursue their own activities."²¹⁷

In other words, in the opinion of the Commission, the course of action to be preferred is the one which has the greater "net utility" or, put simply, the one which results in the greatest happiness for the greatest number of people.

Having identified at the outset the three-fold cost to society of utilizing the criminal law as a tool to control obscenity, the greater part of Working Paper #10 was taken up with the Commission's quantification of the factors on the opposite side of the utility equation - (a) the seriousness of the problem; (b) the assessment of whether harm would result if the criminal proscriptions were removed; and (c) the evaluation of whether the anticipated benefits of criminal proscription and enforcement outweigh the cost to society inherent in using the criminal law as a means of social control.

On the first point the Commission was satisfied that obscenity represents a serious problem but made it clear that "justified dislike" should not be considered enough to warrant

²¹⁷ Ibid., at p. 25.

making an activity a crime.²¹⁸ On this issue Bentham's views were quite clear. He was a critic of laws which existed to outlaw conduct which offended "the sensibilities" and considered to be adverse to the utility principle a law:

"which approves or disapproves of certain actions not on account of their tending to augment the happiness, nor yet on account of their tending to diminish the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them; holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking for any intrinsic ground."²¹⁹

Consistent with its utilitarian approach, the Commission also rejected the suggestion, based on natural law principles, that prohibitions against obscenity could be justified because some people consider obscenity to be simply wrong, immoral, or offensive to God.²²⁰ Not surprisingly, the Commission stated that the mere fact that certain members of society may consider obscenity to be wrong on religious or idealistic grounds is not enough, in and of itself, to render it a serious harm warranting criminal sanctions.²²¹ "Religions and ideals are

218 Ibid., at pp.24-25.

219 Principles of Morals and Legislation, supra note 7, at p. 346.

220 See Working Paper #10, supra note 211, chapter 5.

221 Ibid., at p. 16.

matters of personal commitment. They are insufficient grounds on which to base the criminal law."²²²

Although justified dislike or religious objections to obscenity were not considered sufficient to convince the Commission that obscenity represented a serious problem, the Commission was satisfied that obscenity, at least when exhibited publicly, like other forms of nuisance, annoys and disgusts²²³ and also that it offends privacy and human dignity.²²⁴

The second point, the question of whether the abolition of prohibitions against obscenity would result in "harm", caused the Commission considerably more difficulty. The Commission recognized that the notion of "harm" is not just a descriptive term but also an evaluative one.²²⁵ It was noted that listing the "harms" caused by obscenity is a very difficult task

²²² Ibid.

²²³ Ibid., at p.40.

²²⁴ Ibid., at pp. 25-27.

²²⁵ Ibid., at p. 17. This recognition by the Commission reflects, at least to a certain extent, the comments of Smart discussed infra to the effect that in applying utility theory, the outcome of the utility equation and the choice of which consequence will lead to the greatest happiness is bound to vary depending on who is making the decision, the factors which are taken into account and those which are ignored by the decision maker.

because of the value-judgement involved - the answer arrived at is largely dependent upon what one chooses to count as harm.²²⁶

In chapter six of Working Paper #10, the Commission addressed the question of whether there exists a causal link between obscenity and harm and suggested that the evidence on this point is inconclusive.²²⁷ Although the Commission acknowledged that "failure to prove a causal link doesn't prove there isn't one"²²⁸ it was stated that, at least as far as adults are concerned, there was insufficient evidence upon which to conclude that obscenity causes physical or psychological harm and to justify "calling into play the criminal law."²²⁹

The manner in which the Commission dealt with the causation problem illustrates that there are very practical difficulties inherent in attempting to assess possible harms which may or may not result from a course of conduct. As was discussed in chapter one, one of the problems with using utility theory to assess the relative benefits and harms which may flow from a course of action is that it is impossible to predict with any degree of certainty the future consequences of

226 Ibid., at p.17.

227 Ibid., at p.18.

228 Ibid.

229 Ibid., at p.20.

conduct. In the particular context of obscenity, it is impossible for the Commission to foresee whether the repeal of criminal sanctions against obscenity would have the effect of increasing the incidence of sexual assaults against women or would result in a diminution of respect for women.²³⁰ If these possible future consequences cannot be foreseen, how can utility be evaluated in a meaningful way?

This particular aspect of Working Paper #10 has been the target of criticism.²³¹ Ian Hunter, acknowledging the difficulty of establishing that obscenity causes actual harm, has commented as follows:

"What 'evidence' in fact would convince social scientists of a causal connection between what one reads or views and what one does? What, in this context, is meant by 'proof'? If men are free (in the sense that they deliberate and choose among alternative courses of conduct), it is doubtful that such a causal nexus could ever be 'proved'. At most one can hypothesize that some people's conduct may be affected by exposure to obscenity and other's [sic] not. Broken store

²³⁰ Perhaps the most comprehensive report dealing with the correlation between obscenity and behaviour is the U.S. Report of the Commission on Obscenity and Pornography (1970). For a consideration and rejection of the view that pornography has the effect of promoting hatred against women see, V. Burstyn (ed.), Women Against Censorship (1985).

²³¹ See O'Hearn, supra note 213, at p. 313 who suggests that the traditional view that people are indeed affected in their daily lives by what they read, see and hear should be given some weight. As O'Hearn suggests, there is evidence to support the view "that obscenity has a definite impact, although not always, of course, the impact predicted by a priori reasoning." (p. 314).

windows or a police strike will tempt some to loot, others not... To suppose that one can predict human behaviour from one isolated variable is unduly deterministic. But do not common sense and past experience suggest that exposure to obscenity may be one, perhaps among several, causal factors in some people's behaviour?"²³²

Hunter suggests that the Commission has approached the question from the wrong angle. Rather than proceeding from the premise that in order to warrant the intervention of the criminal law it must be established that obscenity causes identifiable harm, Hunter propounds that the Commission should begin by asking itself - "Given the causal uncertainty, what risks should society run in allowing the most brutal pornography to circulate unchecked? What countervailing 'public good' is being served? What is its redeeming social value?"²³³

However, as has been made clear in chapter one, the underlying social worth of an activity is not considered by utilitarians to be a relevant factor in balancing the utility equation. To Bentham, the game of push-pin was considered to be as valuable as music or poetry and, if it resulted in

²³² Hunter, supra note 213, at p. 306.

²³³ Ibid., at p. 307.

greater pleasure, should be considered more valuable than either of these pastimes.²³⁴

The issue of the relevance of the question of whether obscenity has any redeeming social value leads into a discussion of another of the deficiencies of utility theory which was identified in the preceding chapter - the problem of measuring and distributing net utility.²³⁵ If the comparative utility of the available options is to be measured by reference to the resulting "good" or "happiness" to the greater number of individual members of society and no effort is made to judge these subjective "wants" or "pleasures" against some standard of social worth, how can utilitarianism provide a socially useful yardstick of measurement?²³⁶

As has been discussed previously, utilitarianism makes no accounting of the "relative deservingness" of competing interests.²³⁷ The maximization of the preference of individuals is considered, in and of itself, to be a desirable end. Since all interests are considered to count equally and

²³⁴ For a discussion of the pushpin vs. poetry debate see infra, chapter two.

²³⁵ See infra, chapter two, part (b).

²³⁶ On this point see Weinrib, supra note 86 and Rescher, supra note 2.

²³⁷ The best discussion of this deficiency of utility theory is in Rescher, ibid.

the underlying social worth of the matter in issue is not relevant to utilitarians, an assessment of which alternative will produce the greatest happiness for the greatest number may well lead to a result which is not the best result for the welfare of the community at large. If the majority of individuals in society wish to have the right to view obscene materials, is this a good enough reason to remove the existing criminal prohibitions? Does the fact that something is wished by a majority of people necessarily mean that giving legislative credence to this wish represents sound public policy? The answer to utilitarians would be "yes" but the answer to others who do not adhere to utility theory would probably be no.²³⁸

The Commission, perhaps constrained by the informational blinders which utilitarianism entails, does not deal with this issue. It does, however, address a related difficulty with utility theory - namely, that deciding which alternative will result in the greatest good for the greatest number is hampered by the fact that "good" is an elastic concept. Different people have different ideas about what is good or desirable and what is bad and undesirable. In the Commission's words, those who condemn obscenity "... do so because of their own personal ideals. But these are strictly personal. Each of us is entitled to his own ideals so long as they involve no

²³⁸ See Ayer, supra note 89 and Hahn, supra note 3.

demonstrable harm to others."239 More simply, "different people, different preferences. In the ultimate analysis each man must choose his own priorities."240

To Hunter, the Commission's approach is a reflection of the larger dilemma facing modern society. It also, in his view, reflects the fact that utility theory is inherently unsuitable as a general theory of evaluation because it is incapable of providing criteria by reference to which a meaningful assessment of the available alternatives may be undertaken.241 As he points out, if there is no general agreement as to what is good and what is bad we have no standard by which to take our bearings:

"... it becomes impossible to speak of virtue and vice, elevation and depravity, civilizing influences. If such concepts are relative, each person's preference is as good as his neighbour's. Some people prefer Shakespeare and the Bible; others 'Donkey Love' and 'Women in Bondage'. The only absolute rule remaining is that one must not impose one's taste on others."242

In the final analysis, the Commission completed its assessment of the relative utility of the available options by addressing the third component in the equation - the evaluation

239 Working Paper #10, supra note 211, at p.16.

240 Ibid., at p. 42.

241 For a more general discussion of this point, see infra, chapter two.

242 Supra note 213, at p. 308.

of whether the anticipated benefits of criminal proscription and enforcement outweigh the costs to society which the Commission identified as flowing from the use of the criminal law to control social behaviour. Its conclusion was as follows:

"So should obscenity be against the criminal law? In our view, yes, and no. Public obscenity - like other nuisances that give offence - can rightly be the subject of the criminal law. Private obscenity - which causes little, if any, harm and which doesn't threaten significantly - on the whole cannot."²⁴³

In essence, with respect to "public" obscenity, the Commission concluded that the greatest happiness for the greatest number would be served by protecting individuals from having obscenity involuntarily thrust upon them and by retaining the crime of public obscenity.

However, in so far as "private" obscenity is concerned, the Commission concluded that the "harm"²⁴⁴ caused to society by permitting individuals to choose for themselves whether or

²⁴³ Working Paper #10, supra note 211, at pp. 47-48. The Commission recommended however that private obscenity involving or relating to children should still fall within the ambit of the criminal law.

²⁴⁴ By implication, the Commission considers "harm" in its widest sense to include both physical harm and harm flowing from an affront to society's fundamental values. These considerations are embodied in the test for criminality set out in factors (1) and (2) of Our Criminal Law, supra note 187.

not to privately consume obscene materials was outweighed by the "harm" caused by placing restrictions on freedom of the press and restraining individual freedom to choose one's own life-style and recommended that formal sanctions against "private" obscenity be removed from the criminal law. To the Commission, the imposition of criminal sanctions to prevent a person from privately consuming obscene materials would itself contravene some of the values which the law seeks to protect- the continued existence of laws against private obscenity would invade "the offender's own privacy, dignity and freedom - his freedom of speech, of expression and of living his life in his own way, as well as his freedom to be secure in his own home from the intervention of the authorities."²⁴⁵

This aspect of Working Paper #10 has been criticized on the ground that the recommendation that criminal prohibitions against private obscenity be repealed reflects the underlying rationale that it is more important for the law, at least in the area of private obscenity, to protect against infringement of personal freedoms than in reflecting notions of morality. Ian Hunter, in reviewing the Paper, has suggested that by rejecting moral relativism and all notions of natural law principles, the Commission has "stolen the cornerstone of the

²⁴⁵ Working Paper, #10, supra note 211, at p. 41.

criminal law and left in its place but shifting sand."²⁴⁶ To Hunter there is an important interface between morality and the criminal law which must be both recognized and expressed—"criminal law cut off from moral absolutes is a code for a self-indulgent and debased people."²⁴⁷ Hunter is echoing the more general criticism expressed by Whewell and Ayer, discussed previously,²⁴⁸ that utilitarianism's failure to take account of the moral object of law is a major weakness of Bentham's doctrine.

Whether one agrees or disagrees with the Commission's ultimate recommendation or with the fact that the Commission's proposal with respect to private obscenity accorded greater weight to the protection of individual freedoms than to the need to uphold or reflect morality, the Commission is to be applauded for departing from the confines of pure utilitarian methodology and taking into account the impact of criminal proscription on values such as freedom of speech and freedom of association.

Although the Commission was writing many years before the enactment of the Charter, their approach is remarkably similar

²⁴⁶ Hunter, "Working Paper 10: Limits of Criminal Law: Obscenity: A Test Case", supra note 213, at p. 305.

²⁴⁷ Ibid., at pp. 304-305.

²⁴⁸ See infra, chapter two.

to the manner in which the issue of the constitutionality of laws against obscenity has been addressed in post-Charter cases. In deciding whether obscenity laws are valid, the courts have been faced with three questions - (1) is "obscene" expression a form of expression entitled to protection under section 2(b) of the Charter?; (2) if so, has this freedom been infringed by the law or act in question; and (3) is the infringement reasonable and "demonstrably justified in a free and democratic society"?249

The Commission's recommendation reflects the principle that community tolerance (or underlying morality) is not, in and of itself, an appropriate test for deciding whether forms of speech or expression are entitled to protection. This is consistent with the approach of the courts in a number of Charter cases to refrain from mapping out limits on fundamental freedoms in a way which disentitles certain types of speech or expression from constitutional protection.250

249 This is the basic approach adopted by the Supreme Court of Canada in Irwin Toy Ltd. v. Quebec (A.G.) (1989), 39 C.R.R. 193 (S.C.C.).

250 See, e.g., R.v. Zikman (1986), 27 C.R.R. 297 (Ont. Prov. Ct.); Nordee Investments Ltd. v. City of Burlington (1984), 48 O.R. (2d) 123 (C.A.), leave to appeal to the S.C.C. refused 58 N.R. 237n. However, see contra, the trial decision in Re Koumoudouros and Metropolitan Toronto et al. (1984) 45 O.R. (2d) 426 (S.C.); rev'd on other grounds, (1984) 52 O.R. (2d) 442 (C.A.), leave to appeal to the S.C.C. refused 18 C.R.R.192. For an academic discussion of the question of whether pornography should be considered a constitutionally protected form of expression see: K. Lahey "The Charter and Pornography: Toward a Restricted Theory of Constitutionally

Notwithstanding that burlesque dancing or obscene materials might be considered by many to be without redeeming social value, it is apparent from the cases that even forms of expression which some might consider to be "obscene" are prima facie entitled to protection under section 2(b). For example, in Re Koumoudouros,²⁵¹ Mr. Justice Osler of the Ontario Court of Appeal held that a nude performance in an adult lounge fell within the meaning of "freedom of expression" under section 2(b) and stated:

"While the word burlesque may be thought by most to describe a form of expression that is perhaps more vulgar than most ... artistic endeavours ... it is, nevertheless a form of expression, and to insist on a quality or quantity of clothing from persons expressing themselves in that form does, in my view, limit a freedom of expression otherwise granted by the Charter."²⁵²

The question of whether a limit on freedom of expression is "demonstrably justified" and falls within the confines of section 1 is a somewhat more difficult exercise. In Re

Protected Expression", in J. Weiler and R. Elliot, Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (1986); L. Arbour, "The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression", in Weiler and Elliot, ibid.; R. Elliot, "Freedom of Expression and Pornography: The Need for a Structured Approach to Charter Analysis", in Weiler and Elliot, ibid.; M. Rosenberg, "Fundamental Freedoms - I", in Canadian Charter of Rights and Freedoms (Insight Materials, November 2, 1984).

251 Ibid.

252 Ibid., at p.

Luscner and Deputy Minister, Revenue Canada, Customs and Excise,²⁵³ the Federal Court of Appeal was faced with an appeal from a lower court decision which upheld the decision of the Deputy Minister that a magazine was "immoral and indecent" and therefore subject to importation prohibitions under the Customs Act. The Court held that a prohibition directed towards books was "prima facie an infringement of the freedoms protected by s. 2(b)" and that this was a proposition "not requiring demonstration". The Court went on to consider whether the limitation could be justified under section 1 and concluded that the prohibition was "so vague as to be unreasonable" and that it was therefore of no force or effect.

A similar question of whether the limits on freedom of expression contained in section 159(8) of the Criminal Code are justified under section 1 of the Charter was addressed by the British Columbia Court of Appeal in R. v. Red Hot Video Limited.²⁵⁴ In that case, the Court adopted an approach very similar in principle to that advocated by the Commission and emphasized that any restriction on freedom of expression must be "demonstrably justified":

" ... a restriction on freedom of expression can only be "demonstrably justified" if it can be shown that the material sought to be banned from publication, causes or threatens to cause real and substantial harm to the community.

253 (1985), 15 C.R.R. 167 (Fed. C.A.).

254 (1985), 15 C.R.R. 206 (B.C.C.A.).

...

Apart from such harmful and offensive material involving the subject of sex we are not justified in restricting free expression in this area in any way. It must be remembered that freedom of expression includes the freedom to receive all material which is not harmful to others. It follows that in the privacy of his home every citizen is entitled to read, see or hear all material involving the subject of sex which is not harmful to others."²⁵⁵

The approach of the Commission to the question of the criminality of obscenity, therefore, may be characterized as a utilitarian perspective tempered by an infusion of values and respect for individual liberties. The Commission's use of the utilitarian model is illustrated primarily by the exercise which they engaged in to identify and quantify the "pain" or "harm" caused to society by the publication and distribution of obscene materials and the balancing of these "pains" or "harms" against the corresponding costs to society in having and enforcing prohibitions against such conduct.

However, it is also apparent from the foregoing discussion that the Commission found that the solution which the utilitarian model provides to the questions facing modern law reformers with respect to the issue of obscenity is

²⁵⁵ Ibid., at pp. 228-229. On the question of the "harm" caused by pornography and obscenity see K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1984), 17 Ottawa Law Rev. 33.

unsatisfactory and that it was necessary to depart from pure utility theory in a significant respect - by considering the underlying values involved and the possible negative impact of the criminal prohibitions in question on individual rights. The Commission accorded individual freedom of expression a presumptively high value and considered this value to override the public interest in the prevention of private obscenity. This significant deviation from utility theory, though it might not receive unanimous support on its merits, brings the Commission's recommendation more closely into line with modern social realities and with the environment created by the enactment of the Charter of Rights.

CHAPTER SIX: HATE PROPAGANDA - PROMOTING HATRED

The Commission also had resort to Bentham's utility theory in Working Paper #50 entitled Hate Propaganda.²⁵⁶ In that Paper the Commission was faced with the question of deciding whether to recommend that the crime of promoting hatred, which had been criticized by some as "unjustifiable in a democratic society",²⁵⁷ be retained or repealed.²⁵⁸ The Commission began its exercise by embarking upon a balancing of the utility equation and, citing Bentham in support of its observation, pointed out that no activity should be made a crime without good reason:

* ... making crimes involves repression

²⁵⁶ (Ottawa: Supply and Services Canada, 1986).

²⁵⁷ Ibid., at p. 25. For comments on the appropriateness or drafting of crimes of hate propaganda in modern Canadian society see generally, T. Berger, Fragile Freedoms (1980); P. Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section 1 of the Charter" (1983), 13 Man. L.J. 669; S. Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy" (1970), 9 Alta. Law Rev. 103; S. Cohen, "Hate Propaganda - The Amendments to the Criminal Code" (1971), 17 McGill L.J. 740; H. Sinclair, "Hate Propaganda Laws: Will They Survive the Charter of Rights?" (1982), 3 C.H.R.R. 13; A. Regel, "Hate Propaganda: A Reason to Limit Freedom of Speech" (1985), 49 Sask. Law Rev. 303; Canadian Bar Association, "Hatred and the Law", Report of the Special Committee on Racial and Religious Hatred" (1984); C. Beckton, "Freedom of Expression in Canada - How Free?" in W. S. Tarnopolsky and G. Beaudoin (eds.), The Canadian Charter of Rights and Freedoms (1982), p.75.

²⁵⁸ Criminal Code, R.S.C. 1985, c.C-46, s. 319 (formerly s. 281.2)

and punishment. As Jeremy Bentham observed, '[a]ll punishment is mischief: all punishment in itself is evil.'²⁵⁹ It causes great suffering to the person being punished, loss of liberty to everyone in society, and great expense to the taxpayer."²⁶⁰

The intrusive and repressive nature of the criminal law, suggested the Commission, underlines the need to justify the use of criminal law by those who wish to use it.²⁶¹ In this context, the Commission recognized that the search for an appropriate balance is particularly difficult for crimes of hate propaganda "because it forces us to revisit the conflict between freedom of expression and the interest of the state in criminalizing speech injurious to the public."²⁶²

The Commission observed that, generally speaking, limitations on freedom of expression should be justified where the words involved:

" ... cause or threaten to cause serious harm, such as personal injury (for example, incitement to murder), damage to an important institution (for example, perjury or contempt of court, which damages the criminal justice system), and property loss (for example,

²⁵⁹ J. Bentham, An Introduction to the Principles of Morals and Legislation (Oxford: Clarendon Press, 1879), at p. 170.

²⁶⁰ Working Paper #50, supra note 256, at p. 26.

²⁶¹ Ibid.

²⁶² Ibid., at p. 17.

fraud)."263

The question to be answered by the Commission in the context of the Working Paper was stated to be - "do our crimes of hate propaganda fall within this general principle?"264

To the Commission, the retention of hate propaganda crimes would be justified if the "benefit" to society in prohibiting the activities falling within the definition of the crime of promoting hatred outweighed the possible "harm" represented by the infringement of freedom of speech and expression flowing from the criminalization of certain words.265 On the basis of its assessment, the Commission concluded in the Working Paper that the crime of promoting hatred should be retained.266 This conclusion was based on the reasoning that "promoting enmity" is dysfunctional to society, stirs up hatred and may provoke

263 Ibid., at p. 27.

264 Ibid.

265 See Working Paper #50, ibid., Chapter 2, Part II of which is entitled "Freedom of Expression versus Freedom from Hate: The Balance", at pp. 25-38.

266 Working Paper #50, ibid., recommendation 6. The Commission recommended in the Working Paper that certain amendments be made to the wording of the offence of promoting hatred. These proposed amendments are set out in p. 41 of the Working Paper. In Report #31, Recodifying Criminal Law-Revised and Enlarged Edition (Ottawa: Supply and Services Canada, 1987) the Commission proposed that the new Code contain a crime of "Stirring up Hatred" drafted as follows:

21(1) Stirring Up Hatred.

Everyone commits a crime who publicly stirs up hatred against any identifiable group. (p. 100)

physical attacks on persons or on property.²⁶⁷ The prevention of these sorts of harms, in the Commission's view, outweighed the harms resulting from restrictions on freedom of expression and human activity in general which the retention of hate propaganda crimes would entail.

The Commission's Working Paper on Hate Propaganda is not the first forum in which the question of the appropriate balance between the protection of freedom of expression and the State interest in prohibiting certain types of speech was addressed. In 1966 the Special Committee on Hate Propaganda in Canada (the Cohen Committee) concluded as follows:

" ... the crucial issue in striking a balance between conflicting interests is the weight to be assigned to the interests in question.

...

It is our opinion that ... as among conflicting values, preference must always be given to freedom of expression rather than to legal prohibitions directed at abuses of it. This is not to say that freedom of expression is regarded as an absolute, but only to insist that it will be esteemed more highly and weighted more significantly in the legislative scales, so that legal markings of the borderline areas will always be such as to permit liberty even at the cost of occasional license. But at some point that liberty becomes license and colours the quality of liberty itself with an unacceptable stain. At that point the social

²⁶⁷ Ibid., at p. 31.

preference must move from freedom to regulation to preserve the very system of freedom itself."268

The appropriate balance between these conflicting interests in the context of crimes of hate propaganda has also been addressed by the courts. Of particular interest are two recent decisions of provincial appellate courts which came to completely opposite conclusions on the question of the constitutionality of section 281.2 (now section 319) of the Criminal Code. In the first of these cases, R. v. Keegstra,²⁶⁹ the accused was a teacher who was convicted at trial of having wilfully promoted hatred by teaching his students that the Jewish holocaust was a fiction perpetuated by the Jewish community. In a pre-trial decision which dealt with the disposition of a constitutional challenge to the crime of promoting hatred, the Alberta Court of Queen's Bench held that the right of freedom of expression as guaranteed by section 2(b) of the Charter is not absolute and unbridged and that the crime of wilfully promoting hatred does not offend the Charter right of freedom of expression. The Court of Queen's Bench, in

268 Report of the Special Committee on Hate Propaganda in Canada, at pp. 60-61.

269 (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.); rev'd on appeal [1985] 5 W.W.R. 211 (Alta. C.A.); leave to appeal to S.C.C. granted. A great deal of controversy was initiated by the Keegstra case. For a discussion see S. Mertl and J. Ward, Keegstra: The Trial, the Issues, the Consequences (1985) and D. Bercuson and D. Wertheimer, A Trust Betrayed: The Keegstra Affair (1985).

effect, balanced individual freedom of expression against the rights of other members of society to equality before the law,²⁷⁰ and concluded as follows:

"In my view, the wilful promotion of hatred under circumstances which fall within s. 281.1(2) of the Criminal Code of Canada clearly contradicts the principles which recognize the dignity and worth of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of society; and it negates or limits the rights and freedoms of such target groups and in particular denies them the right to the equal protection and benefit of the law without discrimination.

Under these circumstances, it is my opinion that s. 281.1(2) of the Code cannot rationally be considered to be an infringement which limits 'freedom of expression', but on the contrary it is a safeguard which promotes it."²⁷¹

On Keegstra's appeal from his conviction, however, the Alberta Court of Appeal overturned the lower court decision and declared section 281.2 to be unconstitutional. The Appeal Court's decision was based on several grounds but most pertinent to the present discussion are the court's comments on the issue of the protection of freedom of expression.

²⁷⁰ Charter of Rights and Freedoms, supra note 1, section 15. Also pertinent in this connection is section 27 of the Charter which provides that the Charter is to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

²⁷¹ Supra note 269, at p. 268.

As a preliminary point, Mr. Justice Kerans for the full Court noted that the untruth of the statements in question is not an element of the crime defined in section 281.2. As such, the Code section as drafted would catch what the Court labelled "imprudent speech" - something falling in the middle ground between "calculated falsehood on the one hand and innocent error on the other."²⁷² Having drawn this conclusion, Kerans, J. went on to consider whether "imprudent speech" of the type engaged in by the accused should qualify for protection under section 2(b) of the Charter. Pointing to the "marketplace of ideas"²⁷³ as a justification for protection of expression and quoting from John Stuart Mill, Kerans, J. concluded that all comment, not only "correct and careful" comment, should be protected. Accordingly, the Code section under review was considered to constitute a limit on freedom of expression as guaranteed by the Charter.

The Court then proceeded to canvass the question of whether section 281.2 constitutes a demonstrably justifiable limit under section 1 of the Charter. In this context, the Court stated that section 281.2 does have a rational relationship to a valid legislative objective. The objects of hate propaganda laws which the court considered would give rise

²⁷² Ibid., at p. 224.

²⁷³ This concept was addressed in Grier v. Alberta Optometric Association (1987), 42 D.L.R. (4th) 327 (Alta. C.A.).

to valid competing claims were the risk of physical harm if victims react with anger and the damage to the reputation of victims. Either of these considerations, in the Court's view, would be a sufficient reason to limit imprudent speech.

Kerans, J. also concluded that the provision in question met the requisite tests for clarity and sufficiency. However, the Court ruled that the provision failed to meet the proportionality test. The criteria for determining whether a legislative provision satisfies the proportionality requirement were defined by the Supreme Court of Canada in R. v. Oakes.²⁷⁴ This application of the Oakes proportionality test in the context of the crime of promoting hatred involves answering three questions: (1) is section 281.2 rationally connected to the legislative object?; (2) does it impair the right in question as little as possible?; and (3) is the impairment on individual or group rights so severe that the legislative objective, though important, is outweighed by the impairment?²⁷⁵ Applying his own revised version of the Oakes test, Kerans, J. held that:

"Section 281.2 requires only the promotion of hatred, it does not require successful promotion. It does not require, for guilt, the slightest degree of communal acceptance of the hater's message ... Nor does it require any serious risk of that event. An accused can be convicted

²⁷⁴ Supra, note 144.

²⁷⁵ This is the manner in which the Oakes test is summarized by Kerans, J. in the Keegstra case.

even though nobody believes him or is likely to believe him.

...

Similarly, the competing claim here is to deter serious harm from hatemongering, but s, 281.2 permits the conviction of a person who causes no serious harm or risk of harm. Therefore, it is disproportionate and cannot be affirmed."²⁷⁶

The Court of Appeal decision in the Keegstra case is to be contrasted with the Ontario Court of Appeal's ruling on the same issue in R. v. Andrews et al.²⁷⁷ In that case, the accused were charged with wilfully promoting hatred as a result of their involvement in the publication of hate literature emanating from the Nationalist Party of Canada of which they were all members. The literature in question advanced the theory of white supremacy and branded certain non-white ethnic groups with a number of undesirable propensities.²⁷⁸

Mr. Justice Grange, for the majority of the court, concluded that section 281.2 of the Criminal Code does not infringe the Charter right of freedom of expression and that it was therefore not necessary to go on to justify the existence

²⁷⁶ Supra note 269, at pp. 236-237.

²⁷⁷ (1988), 65 O.R. (2d) 161 (C.A.); leave to appeal to S.C.C. granted.

²⁷⁸ Some excerpts from the Nationalist Party literature in question are reproduced at pp. 165-166 of the decision.

of the offence under section 1 of the Charter.²⁷⁹ The Court of Appeal stated that "[f]reedom of speech or expression has never been absolute"²⁸⁰ and discussed the nature of the balance to be struck between the competing interests at stake:

" ... the crucial issue in striking a balance between conflicting interests is the weight to be assigned to the interests in question. As a sheer matter of drafting, for example, legislation easily could be framed which would catch all instances of hate dissemination ... but this might be accomplished ... with detriment to many instances of legitimate, even if very rough, public debate.

...

It is our opinion that ... as among conflicting values, preference must always be given to freedom of expression rather than to legal prohibitions directed at abuses of it ... But at some point liberty becomes license and colours the quality of liberty itself with an unacceptable stain. At that point, the social preference must move from freedom to regulation to preserve the very system of freedom itself."²⁸¹

The reasoning underlying the Commission's recommendation to retain the crime of promoting hatred is much more in line with the Ontario decision in Andrews than with the Alberta decision in the Keegstra case. As in Andrews, the result of the Commission's balancing exercise favoured the protection of society from the harms caused by promoting hatred over the

²⁷⁹ Supra note 277, at p. 189.

²⁸⁰ Ibid.

²⁸¹ Ibid., at p. 191.

protection of the freedom of individuals to speak their minds. However, in contrast to Andrews, the Commission's decision was not primarily based on the notion that promoting hatred violates human dignity and undermines the fabric of society, but rather the Commission's recommendation was based primarily on its utilitarian assessment that promoting hatred could result in physical harm to others and cause social disorder:282

"Promoting enmity is clearly dysfunctional to society. It stirs up hatred among social groups. It can even lay the foundation for physical attacks upon persons or property. Preventing such harms justifies the use of the criminal law."283

The reasons which the Commission provided to support its recommendation that hate propaganda crimes be retained are significant because they reflect the utilitarian currents underlying the Commission's approach.

As has been discussed above, considerations such as values, morals and rights are not relevant to a utilitarian assessment of the relative "benefits" and "harms" which flow from a given course of conduct. Although it cannot be said that the Commission's work in this area is devoid of any

282 On this point, Mewett and Manning express the view that the purpose of the offence of promoting hatred is to prevent disruptions of the public peace, see Criminal Law (2nd ed.) (1985), at pp. 447-448.

283 Working Paper #50, supra note 256, at p. 31.

consideration of such factors, it is fair to say that the position ultimately arrived at by the Commission is based more heavily on the perceived "harms" represented by the provocation of physical attacks on identifiable groups and the incitement of social disorder than on factors such as the need to denounce attacks on human dignity which were considered important in Andrews.

As a related point, the Commission's utilitarian treatment of the question of whether the abolition of the crime of promoting hatred would result in "harm" and their preoccupation with "physical" harm which could be precipitated by hate mongering is weak because no evidence is offered to show a causal link between conduct that would be classified as hate propaganda and physical attacks on members of minority groups or any form of social disorder generally. As has already been discussed, one of the major weaknesses of utility theory is that, in weighing the relative harms and benefits which may flow from a course of action, it is impossible to predict the future consequences of conduct. If future consequences cannot be foreseen then it is impossible for relative utility to be evaluated in any meaningful way.

The utilitarian underpinnings of the Commission's hate propaganda recommendations are also evidenced by its proposal in Report #31 to eliminate the defence of truth set out in

section 281.2(3) (now section 319(3)) of the Code.²⁸⁴ With the removal of this defence, the truth or untruth of the accused's statement becomes unimportant. This tendency to focus on the result alone is characteristic of utilitarian theory generally. To Bentham himself, only the consequence of an act was important, not the way in which the consequence was reached. His concern was only that the net effect of a given situation should bring about more pleasure, or conversely avoid more pain, than any of the alternate courses of action would have.

Utilitarian theory is committed to a single consideration - to do whatever has the greater net utility in the situation at hand. In pursuing the alternative with the greater net utility, it is not important to have regard to the fact that one course of action may involve an infringement of individual liberty. In sum, the elimination of the defence of truth reflects an overriding of the right of an individual to make true statements about an identifiable group, notwithstanding that such statements may be derogatory or insulting, because utility theory dictates that the right of such individual to

²⁸⁴ See Report #31, supra note 266, at p. 100 wherein the Commission states that the "defences contained in subsection 281.2(3) have been omitted as unnecessary." This reflects a retreat from the position on this issue enunciated at pp. 36-37 of the Working Paper where the Commission stated that the retention of the defence of truth reflects how highly society values freedom of expression.

freely express himself should be subordinated to the interest of society as a whole in maintaining public order.

It may be seen, therefore, that the Commission adopted a relatively pure utilitarian approach in evaluating existing hate propaganda laws and formulating proposals for their reform. The Commission's use of the utilitarian model is illustrated primarily by the exercise which the Commission engaged in to identify and quantify the potential "harm" caused to society by the promotion of hatred and the balancing of these harms against the corresponding cost to society in having crimes to prohibit such conduct.

The solution which the utilitarian model has provided with respect to the question of whether the crime of promoting hatred should be retained, though supportable in the result, is somewhat disappointing in substantive terms. The failure of utilitarianism to take into account interests, other than the interest of society in maintaining public order and related "physical" harms, which are protected by hate propaganda crimes, is a major shortcoming. Rather than focussing on utilitarian considerations, further emphasis should have been given by the Commission to the non-physical "harms" to specific groups and to the fabric of society generally which are represented by activities falling within the definition of the crime of promoting hatred.

CHAPTER SEVEN: THE DEFENCE OF NECESSITY

The defence of necessity is not found in our present Criminal Code but is a common law defence which has, in recent years, been imported into Canadian law by the courts²⁸⁵ through the application of section 8(3) of the Code.²⁸⁶ The Law Reform Commission of Canada in Working Paper #29287 and in Report

²⁸⁵ For some relatively recent cases in which the common law defence of necessity has been applied or considered (but has not necessarily succeeded) in Canada see, e.g., R. v. Krieger [1984] 4 W.W.R. 610 (Sask. Prov. Ct.); R. v. Morris (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.); R. v. Walker (1979), 48 C.C.C. (2d) 126 (Que. C.A.); R. v. Salvador (1981), 59 C.C.C. (2d) 521 (N.S.C.A.); Woodhouse v. The Queen (1982), 38 O.R. (2d) 351 (Co. Ct.); R. v. Young (1984), 39 C.R. (3d) 290 (Ont. Prov. Ct.); R. v. Gilkes (1978), 8 C.R. (3d) 159; R. v. Doud (1982), 18 M.V.R. 146; Morgentaler v. The Queen, [1976] 1 S.C.R. 616; R. v. Morgentaler (1976), 33 C.R.N.S. 244, leave to appeal refused [1976] 1 S.C.R. x; R. v. Guenther (1978), 8 Alta. L.R. 125; R. v. Perka et al. (1982), 69 C.C.C. (2d) 405 (B.C.C.A.), appeal dismissed [1984] 2 S.C.R. 232; R. v. Berriman (1987), 62 Nfld. & P.E.I.R. 239 (Nfld. C.A.).

²⁸⁶ Section 8(3) preserves the application of defences recognized at common law. The defence of necessity in the context of the present law in Canada is discussed in D. R. Stuart, Canadian Criminal Law: A Treatise (1983), at pp. 420-428; J. Fortin and L. Viau, Traite de droit penal general (1982), at pp. 284-289; A. Mewett and M. Manning, Criminal Law (2nd ed.) (1985), at pp. 348-352. One of the best recent articles on the subject is E. M. Morgan, "The Defence of Necessity: Justification or Excuse?" (1984), 42 U. T. Fac. L. Rev. 165. For an interesting discussion of the common law origins and philosophical underpinnings of the defence of necessity see, George Fletcher, Rethinking Criminal Law, *supra* note 115, ch. 10.

²⁸⁷ Supra note 180.

#31288 recommended that the defence be codified and that the Criminal Code contain a "catch-all" defence of necessity.

According to the scheme proposed by the Commission, the question of whether the accused will be afforded the benefit of the defence is dependent upon an assessment of the net utility flowing from each of the alternative courses of action which could have been pursued in the circumstances. Expressed in mathematical terms, the accused will be justified in acting as he did if the harm avoided or the happiness caused (on the left side of the equation) exceeds the evil of the act committed (on the right side of the equation).

The formulation of the defence of necessity adopted by the Commission, both in the Working Paper and in the Report, reflects the utilitarian model of necessity as a justification (as opposed to an excuse)²⁸⁹ which model was accepted by the majority of the Supreme Court of Canada in the leading case of Perka v. The Queen.²⁹⁰ In that case, Dickson, J. (speaking for the majority of the Court) articulated the utilitarian theory of the defence of necessity as a defence that would:

288 Supra note 191.

289 For an exploration of the ramifications of the Commission's proposal to "eliminate necessity as an excuse (in all but its name)", see Edward M. Morgan, "The Defence of Necessity: Justification or Excuse?", ibid.

290 Supra, note 285.

" ... exculpate actors whose conduct could reasonably have been viewed as 'necessary' in order to prevent a greater evil than that resulting from the violation of the law. As articulated, especially in some of the American cases, it involves a utilitarian balancing of the benefits of obeying the law as opposed to disobeying it, and when the balance is clearly in favour of disobeying, exculpates an actor who contravenes a criminal statute. This is the 'greater good' formulation of the necessity defence."²⁹¹

The Commission's expression of the defence of necessity as a justification, rather than as an excuse, is significant. Generally speaking, defences expressed as excuses, operate by recognizing the criminality of the accused's conduct but negating his blameworthiness on the basis that he acted under such extreme pressure that the act was not a manifestation of the accused's free will. "It is the compassion of the jury for the accused's predicament which is sought, rather than a justification for the offending act itself."²⁹² In contrast to excuses which operate to exonerate an individual accused for his wrongful act, a justification negates the wrongfulness of the act itself. Packer explains the distinction in this way:

"[c]onduct that we choose not to treat as criminal is 'justifiable' if our reason for treating it as noncriminal is predominantly that it is conduct that we applaud, or at least do not actively

²⁹¹ Ibid., at p. 247.

²⁹² Morgan, supra note 288, at p. 167.

seek to discourage; conduct is 'excusable' if we deplore it but for some extrinsic reason conclude that it is not politic (sic) to punish it."293

In sum, a person who was justified did what was right - the criminality of the act is vitiated and the actor incurs no liability. A person who is excused did something that was wrong but due to certain circumstances should not be punished, or punished as severely as he otherwise might have been.

The difference in practical terms of these different concepts can be illustrated by applying them to the facts in the celebrated case of R. v. Dudley and Stephens.294 In that case, three sailors adrift at sea in a life boat killed a cabin boy who was severely weakened by the ordeal and cannibalized his body so that the three could survive. Applying the necessity excuse to these facts, the sailors would be exculpated if the jury were convinced that the accused had acted under pressures which no ordinary person could be expected to bear and that the grave circumstances in which they found themselves excused their behaviour. In assessing the applicability of the defence of necessity expressed as a justification, no liability would be imposed if the sailors

293 Limits of the Criminal Sanction, (1968), at p. 113.

294 (1884), 14 Q.B. 273.

were justified in acting as they did on the basis that three lives are more valuable than one.

Edward Morgan in his article entitled "The Defence of Necessity: Justification or Excuse" uses the same example to illustrate the theoretical differences between these two classifications of defences and concludes:

"Thus, an analysis premised on justification pits a libertarian view, which could never concede such an assertion [that two lives are more valuable than one] against that of utilitarianism, from which perspective the value of a single life is only significant insofar as it serves to maximize lives in the aggregate."²⁹⁵

Expressed by the Commission as a justification, the necessity defence has obvious Benthamite roots.²⁹⁶ Bentham himself has expressed the view that an individual should not be punished for his actions in cases where "mischief" is caused by his act but "the same act was necessary to the production of a benefit which was of greater value than the mischief."²⁹⁷

²⁹⁵ Supra note 288, at p. 170.

²⁹⁶ The defence, if expressed as an excuse, does not exhibit the same utilitarian underpinnings. Viewed as an excuse, the defence of necessity "concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor." See Perka, supra note 285.

²⁹⁷ Principles of Morals and Legislation, supra note 9, at p. 159.

Even though the Commission's approach to the defence of necessity reflects a strong utilitarian foundation, it is interesting for the purpose of this thesis to examine the manner in which the Commission's approach to the defence of necessity changed between the Working Paper phase and the publication of its Report to Parliament. The Commission's Working Paper recommendation on the subject of the defence of necessity reflected pure utilitarian theory - whether the defence would apply in a given case was dependent only on the outcome of the balancing of the utility equation. The revised proposals contained in Report #31, though characterized by strong utilitarian underpinnings, made allowances for the infusion of value-laden factors into the balancing of the utility equation and modified Bentham's theory to take such factors into account.

In Working Paper #29, The General Part: Liability and Defences,²⁹⁸ the Law Reform Commission proposed that the defence of necessity be formally recognized in Canada and be included in the Code. The defence proposed by the Commission in the Working Paper would exculpate an actor from liability for a crime committed out of necessity provided that:

(a) he acted to avoid immediate harm to

²⁹⁸ Supra note 180.

persons or property;

- (b) that such harm substantially outweighed the harm resulting from that offence; and
- (c) that such harm could not effectively have been avoided by any lesser means.

The rationale provided by the Commission for the inclusion of such a "catch-all" defence was stated to be as follows:

"[W]ithin certain limits, it is justifiable in an emergency to break the letter of the law if breaking the law will avoid a greater harm than obeying it.

...

As a general principle good must be maximized and evil minimized. As a corollary, if non-compliance with law avoids greater harm than compliance, then non-compliance must be preferred. Indeed, insofar as laws are designed to maximize good and minimize evil, non-compliance with the letter of the law may turn out actually to be compliance with its spirit."²⁹⁹

The draft provision proposed in Working Paper #29 attracted considerable criticism. Professor Leigh, for example,³⁰⁰ criticized the fact that the proposal as drafted in the Working Paper failed to make adequate provision for "life for life" cases. To Professor Leigh, the draft proposal was

²⁹⁹ Ibid., at p. 93.

³⁰⁰ "The Law Reform Commission of Canada and the Reform of the General Part", [1983] Crim. Law Rev. 438.

wholly unsatisfactory because it did not make a clear pronouncement as to whether the defence would be available in cases where, through extreme emergency, loss of the accused's life may have seemed to outweigh the loss of the another's life.³⁰¹

This criticism reflects one of the most commonly expressed deficiencies of utility theory - that utilitarianism tends to view matters from a moral-neutral or value-neutral perspective. The purely utilitarian-based version of the defence of necessity proposed in clause 12 of the Working Paper failed to provide an answer to the moral dilemma of deciding which of two lives is more worthy of being saved at the expense of the other. Underlying moral issues such as this are not considered by pure utilitarians to be relevant to an assessment of the utility quotient. On this point, Morgan explains that the utilitarian "lesser evils" approach fails to provide a philosophically acceptable solution to the lifeboat scenario similar on its facts to those in the Dudley v. Stephens case. Clearly, utilitarian theory in its purest form would sanction such a sacrifice. The greatest good of the greatest number is served by permitting several to survive at the cost of one life. From a utilitarian perspective "the value of a single

301 Ibid.

life is only significant insofar as it serves to maximize lives in the aggregate."³⁰²

The inappropriateness of the utilitarian approach to resolving the "life for life" dilemma illustrates a second deficiency of utility theory generally - the difficulty of deciding how utility is to be distributed. In terms of the lifeboat scenario, it is apparent that utility is to be distributed among a group comprised of the cabin boy and the shipwrecked sailors. Can the sacrifice of the cabin boy really be justified on the basis that the result represents an appropriate distribution of net utility? To Professor Morgan the question must be answered in the negative:

"The victims' submission of the sum total of their holdings (i.e., their lives) to the accused may effect a redistribution, but cannot on any logic constitute a distribution in which all of the parts of the whole (i.e., occupants of the life boat) are allocated a share of the holdings in accordance with some chosen criterion (i.e., strength, merit etc.). As such, the act of killing becomes a direct survival of the fittest claim ... and cannot be considered justifiable as a distribution at all."³⁰³

In effect, the solution to the life boat scenario dictated by utility theory is a solution that is unacceptable on fairness

³⁰² Morgan, "The Defence of Necessity: Justification or Excuse?", supra note 289, at p. 170.

³⁰³ Ibid., at p. 171.

grounds or on moral grounds and reflects a pure and unflinching sacrifice of the rights and interests of the individual to the welfare and interests of the majority.

After considerable consultation and debate over the wording of the necessity defence contained in the Working Paper, the Commission took a second look at the issue and recommended to Parliament in Recodifying Criminal Law,³⁰⁴ that Canada's new criminal code contain a defence of necessity re-drafted as follows:

3(9) Necessity.

(a) General Rule. No one is liable if:

- (i) he acted as he did to avoid immediate harm to the person or immediate serious damage to property;
- (ii) such harm or damage substantially outweighed the harm or damage resulting from that crime;
- (iii) such harm or damage could not effectively have been avoided by any lesser means.

(b) Exception. This clause does not apply to anyone who himself purposely causes the death of, or seriously harms, another person.³⁰⁵

³⁰⁴ Supra, note 286.

³⁰⁵ See ibid., recommendation 3(9), at p. 36.

It is evident from a comparison of the recommendations in the Working Paper and in the subsequent Report that although the Commission appears to be adopting a basically utilitarian approach as a basis for its recommendation concerning the codification of the defence of necessity, the Commission's re-draft of the defence as it appears in the Report to Parliament represents a significant retreat from a truly Benthamite perspective. Clause 3(9)(b) of the Commission's proposal creates an exception to the application of the defence of necessity in cases where the individual claiming the benefit of the defence has purposely caused the death of another or has seriously harmed him. Therefore, in the life boat scenario discussed above where the life of one was sacrificed to save several, the revised defence of necessity as proposed by the Commission in Report #31 would not apply to exculpate the accused.

In departing from pure utilitarian theory and disentitling an accused from relying on the defence of necessity where he has killed or seriously harmed another, the Commission is to be applauded for formally recognizing that the life or safety of one is as worthy of protection as the lives and safety of many others. In modifying Bentham's utility principle in this way to take into account additional moral or value-oriented considerations, the Commission has arrived at a recommendation that is more easily supportable on moral grounds.

Notwithstanding that the Commission departed from Bentham's pure utility model in order to provide for "life for life" cases, the fact that the recommendation is so closely tied to utilitarian foundations gives rise to some problems, however. Perhaps the most serious of the problems with the Commission's formulation of the necessity defence is its consequentialist perspective - it calls for a balancing of quantities that are uncertain and incapable of precise calculation. As has been discussed in chapter one, utilitarians consider an action to be acceptable when it augments the happiness of the community to a greater extent than it diminishes it. However, happiness is an outcome of an action and outcomes can never be ascertained and evaluated until they actually occur. How then is the relative utility flowing from alternative possibilities to be properly assessed?

According to the Commission's recommendation, the defence of necessity will be available only where (1) the accused acted as he did in order to avoid immediate harm to the person or immediate damage to property; and (2) that the harm avoided substantially outweighed the harm or damage caused by the accused's conduct. A fairly straightforward application of the principle of utility as expressed in this formulation of the necessity defence would dictate, by way of example, that the blameworthiness or criminality of the act of going through a

red light is outweighed by the pursuit of the greater good of getting an ailing passenger to hospital.³⁰⁶ This evaluation is based on the implicit reasoning that the probable result of not getting the passenger to hospital would be serious jeopardy to the passenger's health, or perhaps even death. It is the seriousness of this probable consequence which is actually said to outweigh the "evil" of the act of going through the red light.

At this simple level, the principle of utility works fairly well. However, when other considerations come into play which considerations may affect the outcome of the actor's conduct, the principle begins to lose ground. Hypothetically speaking, what if in crossing the intersection against the red light to get the passenger to hospital the driver causes another approaching car to swerve and hit a post? Would the breach of the law still be justified? What if the shock of nearly hitting another car coming through the intersection causes the passenger to die before getting to hospital?

If the prohibited conduct engaged in by the accused does not have the desired effect and the passenger dies before arriving at the hospital is this relevant? What if the passenger was already dead when the accused ran the red light?

³⁰⁶ This is the illustration of the application of the necessity defence put forward by the Commission in Working Paper #29, supra note 180, at p. 92.

In other words, how does the actual outcome, as distinct from what the accused assumed the outcome would be, figure into the utility equation? That is not to say that this problem would be eradicated if some model other than the utility model were adopted. The causation problem discussed above is largely a product of an attempt to arrive at some general rule which will apply in an infinite variety of fact situations. The object of the discussion is, however, to illustrate that resort to utilitarian methodology does not suggest a satisfactory resolution of the questions posed by the Commission's recommendation.

A second problem with the application of the utility-based justification of necessity is that a defence which exculpates an actor for breach of the law committed in pursuit of some "greater good" begs the question of "whether the actor furthers the greater good in violating the prohibitory norm" or indeed whether the court "furthers the greater good by recognizing the conduct as justified."³⁰⁷ Again, looking at the fairly simplistic example of disobeying a traffic signal to get an ailing passenger to hospital, the answer seems fairly clear. According to pure utilitarian theory, acquitting an accused who breaks the law in the pursuit of some higher value is justifiable if affording the accused a defence will prompt

³⁰⁷ George Fletcher, Rethinking Criminal Law, supra note 117, at p. 791.

other members of society to act in furtherance of similar beneficial ends. However, the utilitarian rationale for recognizing necessity as a justification is not so evident in other cases. George Fletcher offers the example of an accused who blows up an oil pipeline for the expressed purpose of saving the Alaskan tundra.³⁰⁸ Should an individual be entitled to violate the prohibitory norm and be considered to be justified in destroying property in pursuing what he perceives to be the greater good? Should the judgement of individuals be entitled to overrule the judgement of the legislature in enacting prohibitions against certain types of conduct?

The answer, suggests Professor Fletcher, is to limit the application of the defence of necessity to cases where the accused acts in response to "an impending, imminent risk of harm to a legally protected interest."³⁰⁹ The actual result may be considered to be irrelevant (assuming that the accused did not act recklessly or negligently) if the accused was acting in a situation of imminent peril in which he did not have the opportunity to weigh with precision each of the possible consequences which might flow from his conduct. Second, if the defence of necessity were limited to cases of "imminent risk" -

308 Ibid., at p. 793.

309 Ibid., at p. 795. This is the approach adopted in the German Penal Code.

" ... the individual cannot pick the time, the place or the victim of his judgment about what the law requires him to do."310

This imminence requirement was adopted by the Commission and is reflected in sub-clause 3(9)(a)(i) of Report #31. In effect, it narrows the circumstances in which an accused would be able to "assert his view of rightful conduct" and minimizes the risk that an accused would be prompted to violate prohibitory norms and to attempt to justify his public actions on the basis that they further his private notion of "the common good".

On this point, the Supreme Court of Canada in the Perka case came to a different conclusion than Fletcher and stated that:

"[t]he fact that one act is done out of a sense of immediacy or urgency and another after some contemplation cannot ... serve to distinguish the quality of the act in terms of right or wrong. Rather, the justification must be premised on the need to fulfil a duty conflicting with the one which the accused is charged with having breached."311

Madame Justice Wilson concurred with the view expressed by Mr.

310 Ibid.

311 Supra note 285, at p. 274.

Justice Dickson in Morgentaler v. The Queen³¹² that the law cannot recognize a defence which would permit an individual "to violate the law because in his view the law conflicted with some higher social value." The justification of necessity should only come into play, therefore, where the "higher social value" which the accused claims he was pursuing is one which flows from a duty imposed or recognized by the law.

Furthermore, the Supreme Court of Canada expressly rejected the argument that the justification of necessity should be recognized in cases where social utility is maximized by engaging in prohibited conduct. As Madame Justice Wilson explains:

"... a utilitarian balancing of the benefits of obeying the law as opposed to disobeying it cannot possibly represent a legitimate principle against which to measure the legality of an action since any violation of right permitted to be justified on such a utilitarian calculus does not, in the Chief Justice's words, 'fit[s] well with the judicial function'. The maximization of social utility may well be a goal of legislative policy but it is not part of the judicial task of delineating right and wrong."³¹³

It is evident from the preceding discussion that the Commission adopted a relatively pure utilitarian model in formulating its proposal for the codification of the defence of

312 [1976] 1 S.C.R. 616, at p. 678.

313 Supra note 285, at pp. 274-75.

necessity. The Commission's proposal, with certain exceptions, would exculpate an accused who engaged in prohibited behaviour where the benefit flowing from such behaviour outweighed the harm caused by his actions. Notwithstanding that the Commission departed from Bentham's pure theory to a limited extent by providing that the defence is inapplicable where the accused kills or seriously harms another and by qualifying the applicability of the defence by imposing an "imminence" requirement, the fact that the proposal is tied so closely to utility theory gives rise to certain problems. The consequentialist nature of the principle of utility leads to uncertainty. The value-neutral or moral-neutral perspective of the utility equation also justifies actions which increase social utility without any consideration of the underlying rightness or wrongness of the act. The conclusion which flows from the preceding discussion of the problems associated with adopting Bentham's principle of utility in the context of the defence of necessity is that utilitarianism, at least on its own, is incapable of serving as an appropriate model for defining the ambit of the defence and leads to a result that is not wholly supportable insofar as certainty, morality or fairness are concerned.

CHAPTER EIGHT: THE DUTY TO RESCUE

The recognition of a duty to rescue is one of the most interesting and controversial of the proposals forming part of the Commission's work on the subject of the recodification of the criminal law.³¹⁴ It also represents one of the clearest reflections of the application of Bentham's principle of utility found anywhere in the Commission's work.

Failure to rescue is not a crime under the present Criminal Code, but a general duty to rescue is recognized in Quebec³¹⁵ as well as in a number of foreign jurisdictions.³¹⁶ Whether the criminal law should recognize a duty to rescue was first addressed by the Law Reform Commission in Working Paper #46 entitled Omissions, Negligence and Endangering.³¹⁷ In that Paper, the Commission recommended that the Code impose a

³¹⁴ On the recognition of a duty to rescue generally see, T. Benditt, "Liability for Failing to Rescue" (1982), 1 Law and Philosophy 391; A. Wozzley, "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983), 69 Virginia Law Rev. 1273; J. Feinberg, "The Moral and Legal Responsibility of the Bad Samaritan" (1984), 3 Crim. Justice Ethics 56; E. Weinrib, "The Case for Failing to Rescue" (1980), 90 Yale L.J. 247.

³¹⁵ See Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 2.

³¹⁶ For example, Belgium, France, Germany, Greece, Italy, Poland, Sweden and the State of Vermont.

³¹⁷ Working Paper #46 (Ottawa: Supply and Services Canada, 1985).

general duty upon citizens to come to the aid of another in peril.³¹⁸ The Working Paper recommendation was adopted and drafted into legislative form in Report #31, Recodifying Criminal Law.³¹⁹ In that Report the Commission proposed that the Code contain the following provision:

10(2) Failure to Rescue.

(a) General Rule. Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.

(b) Exception. Clause 10(2)(a) does not apply where the person cannot take reasonable steps to assist another without risk of death or serious bodily harm to himself or another person or where he has some other valid reason for not doing so.

The utilitarian underpinnings of the Commission's proposed duty to rescue are clear from a review of the commentary accompanying the Working Paper recommendation. In the Working Paper commentary, the Commission justified the imposition of a duty to rescue by balancing the potential benefit to society in having such a duty against the inconvenience or "harm" which would be caused to an individual who found himself in a position in which he would have to intervene in order to discharge his legal duty.

³¹⁸ See recommendation 6, and the corresponding commentary at pages 17 - 20.

³¹⁹ Supra, note 286.

In terms of the "harm" which would result from the imposition of a duty to rescue, the Commission recognized that the common law has been generally reluctant to compel altruism and to prescribe criminal liability for failing to act for the benefit of another absent a special relationship between the victim and the rescuer giving rise to a duty of care.³²⁰ This reluctance stems partly from the significant intrusion upon one's personal liberty that is represented by the imposition of such a duty to act.³²¹ As the Commission explains:

" ... Penalising omissions raises a more acute problem of circumscribing liberty than does punishing affirmative acts. As proponents of individualism and the minimal state argue, to prevent one man from harming another is little restriction on his liberty, but to make him serve another, even temporarily, is like making him a slave. ... A criminal law meant to serve the interests of society must reflect that the freedom of that society's members is one of those interests and must strike a balance between the interests of those to whom good is to be done and the liberty of those required to do that good."³²²

³²⁰ Theodore Benditt suggests that the philosophy underlying the current state of Canadian law on this point is sometimes classified as "individualism, the idea that each person is responsible only for himself, except when he stands in a relationship, usually voluntary, with someone else which imposes on him an obligation to act for the benefit of the other." See supra note 314, at p. 392.

³²¹ For a discussion of this point see Fletcher, supra note 115, at p. 602. See also, J.C. Smith, "Liability for Omissions in the Criminal Law" (1984), 4 J. Legal Stud. 88.

³²² Working Paper #46, supra note 317, at p. 6.

However, on balance, the Commission took the position that the harm represented by this infringement of personal liberty would be small and would be outweighed by the overall benefit to society which would result from the imposition of a duty to rescue in certain limited circumstances. In sum, the Commission's assessment of the net utility of each of the available alternatives favoured the recognition of a limited duty of easy rescue, particularly in view of the fact that:

"[i]t would be very seldom that a person would be called upon to forego his freedom for the benefit of others. In easy rescue situations, where one person's life can only be preserved at the cost of another's small inconvenience, the community conscience would be shocked at a refusal to shoulder such inconvenience." 323

The Commission's conclusion that the imposition of a duty to come to the aid of another in peril could be justified on utilitarian grounds reflects Bentham's personal views on this issue. In An Introduction to the Principles of Morals and Legislation,³²⁴ Bentham discusses the utility of the imposition by law of a duty to rescue and poses this question:

" ... in cases where a person is in danger, why should it not be made the duty of every

323 Ibid., at page 19.

324 Supra note 9.

man to save another from mischief when it can be done without prejudicing himself?"³²⁵

Bentham offers several illustrative cases in which a duty to rescue should exist. For example, he suggests, where a drunk has fallen asleep with his face in a puddle there should be a duty to save that person from drowning.³²⁶ According to Bentham's analysis, the principle of utility dictates that in cases of easy rescue, the avoidance of death or injury clearly outweighs the inconvenience occasioned upon the rescuer and, in this way, the imposition of a duty to rescue contributes the greater good to the greatest number. However, even to Bentham, the duty to rescue would be a limited one, triggered by the co-existence of two important factors - the victim's emergency and the relative absence of inconvenience to the potential rescuer.

Notwithstanding the attractiveness of the recognition of a general duty to rescue, particularly on moral or humanitarian grounds, the fact that the Commission's proposal reflects such strong utilitarian undercurrents gives rise to a number of problems. First, the duty to rescue as formulated by the Commission exhibits a deficiency which plagues utilitarian-based proposals generally - that is, vagueness. The utility

³²⁵ Ibid., at p. 323.

³²⁶ Ibid.

principle purports to be universal and to answer all questions by reference to some homogeneous "standard of consistency and completeness".³²⁷ As a consequence, utility-based proposals tend to address generalities rather than specifics and to express broad statements of principle. They also tend to be somewhat vague and open-ended. This is true of the Commission's proposal. The duty to rescue proposed by the Commission is couched in very broad terms and its mathematical orientation fails to provide answers to basic questions such as: Who should have a duty to rescue? To whom is the duty owed? How much must the rescuer do in order to fulfill the duty imposed on him? How much danger should he be expected to expose himself to? To Weinrib, a duty to rescue couched in utilitarian terms and restricted in such a manner that it does not apply in situations where "the costs to one's own projects outweigh the benefits to the recipient's" is bound to be ill-defined because "the cost-benefit analysis is so difficult to perform in particular instances."³²⁸

In addition, serious causation problems arise from the consequentialist perspective of the utilitarian theory upon which the Commission's duty to rescue is based.³²⁹ Apart from

³²⁷ Sen, supra note 3, at p. 16.

³²⁸ Weinrib, supra note 3, at p. 282.

³²⁹ On this point see Epstein, "A Theory of Strict Liability" (1973), 2 J. Legal Stud. 160 and Weinrib, ibid., at pp. 258-262.

the threshold question of whether failing to act can properly be considered to cause the harm that befalls someone, difficulties in applying traditional rules of causation stem from the exception to the application of the duty which is set out in clause 10(2)(b).³³⁰ This clause provides a defence if the potential rescuer could not intervene without risk of death or serious harm to himself or another, or if he had some other valid reason for not assisting the victim. The difficulty with the utility-based duty proposed by the Commission is that the existence of the duty to act, and hence the imposition of criminal liability for failing to act in situations where the duty exists, is dependent upon the potential rescuer's assessment of the in futuro consequences of his conduct. As Quinton has explained, "utilitarianism imposes an impossible burden of calculation" upon the actor.³³¹ Is the potential rescuer excused if he fails to intervene because, in his estimation, it might be dangerous where in fact no danger exists? What if the rescuer makes some effort to offer assistance but does not do all that he can and the victim dies or suffers injury? Can the rescuer be said to have caused the harm? What if there are a number of potential rescuers at

³³⁰ Clause 10(2)(b) provides that the duty to rescue imposed by clause 10(2)(a) "does not apply where the person cannot take reasonable steps to assist without risk of death or serious bodily harm to himself or another person or where he has some other valid reason for not doing so."

³³¹ See supra note 5.

hand all of whom do nothing - which of them can be said to be responsible for the resulting harm? If one of a group of potential rescuers does give assistance to the victim but is unsuccessful in saving the victim are all those who stood by while one individual acted in vain liable for causing the victim's death?³³² The Commission's draft proposal fails to provide answers to any of these questions.³³³

The most cogent argument against the imposition of a duty to rescue is the fact that it subordinates the rights of the individual to the interest of society as a whole. The Commission recognized in the Working Paper upon which the recommendation in Report #31 is based³³⁴ that the imposition of such a duty amounts to an infringement of personal liberty. Some writers have expressed the view that the law should not compel altruism and force one person to come to the aid of another, particularly in the absence of a special relationship between the rescuer and the victim giving rise to a duty of

³³² For a discussion of some of the causation problems caused by the imposition of a duty to rescue see Benditt, supra note 314, at pp. 396-400.

³³³ In this context it must be conceded that even if the Commission had resorted to some model other than the utility model as a basis for its recommendation, the proposal would very likely be plagued with certain of the difficulties discussed above. Vagueness and uncertainty are natural by-products of general rules which attempt to define responses to open-textured fact situations.

³³⁴ Working Paper #46, Omissions, Negligence and Endangering, supra note 317. See pp. 17-20 of this Working Paper.

care.³³⁵ Others have argued that the law should not penalize people for failing to act, but rather that the law should impose sanctions only for positive acts which cause substantive harm to others.³³⁶ Bentham was not, however, concerned with this semantic distinction between misfeasance and nonfeasance.³³⁷ To him, it was the consequence that was important, not the way in which it was reached. Bentham's concern was only that the effect of a given situation should bring about more pleasure, or conversely avoid more pain, than any of the alternate courses of action would have.³³⁸

335 A most useful discussion of the pros and cons of this view can be found in J.C. Smith, "Liability for Omissions in the Criminal Law" (1984), 4 J. Legal Stud. 88. Also of interest is the reply of Hyman Gross to Professor Smith's article, "A Note on Omissions" (1984), 4 J. Legal Stud. 308.

336 One of the reasons for this view is the problem of showing a causal link between the inaction and the result - for a discussion see G. Fletcher, Rethinking Criminal Law, supra note 115, at pp. 601-602. It has also been suggested that imposing duties to act and imposing punishment for failing to act constitutes a more significant infringement of personal liberty than does punishing wrongful acts. On this point see Fletcher, at p. 602 and M. Levin, "A Hobbesian Minimal State" (1982), 11 Phil. & Pub. Affairs 338. Both of these problems with imposing criminal liability for omissions are discussed in Working Paper #46, Omissions, Negligence and Endangering, supra note 307.

337 For a discussion of the distinction between nonfeasance and misfeasance see Law Reform Commission of Canada, Omissions, Negligence and Endangering, supra note 317, at pp. 3-13.

338 For an explanation see E.J. Weinrib, "The Case for a Failing to Rescue" (1980), 90 Yale Law J. 247, at p. 281.

As has been discussed previously, utilitarians are committed to one thing only - to do whatever has the greater net utility in the situation at hand. If requiring a bystander to come to the aid of another would, on the whole, have the most desirable consequences on utilitarian grounds, then it must be preferred even at significant cost to some individual. As has been discussed in an earlier chapter,³³⁹ such a subordination of the rights of the individual to the greater good is completely at odds with the environment created by the Charter of Rights. The Charter, which is regarded as the supreme law of the land and the yardstick against which all other laws are measured, is wholly committed to the protection and furtherance of the fundamental rights of individuals. Under the Charter, measures which serve broad public interests and further the greater good may be struck down if the cost to individual liberty is too great.

A related difficulty of looking at the duty to rescue from a purely utilitarian perspective is that utilitarianism attempts to solve problems in an atmosphere devoid of moral or humanitarian concerns. It is evident from the preceding discussion that the desirability of conduct on moral or humanitarian grounds is, strictly speaking, not relevant to an assessment of net utility. On this point, it is worth noting that the Commission, after justifying its recommendation that

³³⁹ See chapter three.

the Code contain a duty of easy rescue on utilitarian grounds, went beyond the confines of pure utilitarian theory and commented on the moral and humanitarian dimensions of the easy-rescue debate by suggesting that Canada should bring the law "into line with present-day moral intuitions and make easy rescue in emergencies a matters of general obligation."³⁴⁰

It can be seen from the above discussion that the Commission, notwithstanding its fleeting comments on desirability of imposing a duty to rescue to reflect underlying moral and humanitarian concerns, adopted a relatively pure utilitarian model in formulating its proposals for the recognition in the criminal law of a duty of easy rescue. The Commission's adherence to Bentham's utility model is illustrated primarily by the manner in which they identified the "harms" or hardships on individuals which would flow from the imposition of such a duty and the balancing of these harms

³⁴⁰ See Working Paper #46, supra note 317, recommendation 6. The Working Paper recommendation was incorporated in Report #31, Recodifying Criminal Law, supra note 266. In clause 10(2) of that Report, the Commission recommended that the Criminal Code contain a crime of failure to rescue drafted as follows:

Failure to Rescue.

(a) General Rule. Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.

(b) Exception. Clause 10(2)(a) does not apply to where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person or where he has some other valid reason for doing so.

against the relative benefits to society as a whole in requiring members of society, in limited situations, to come to the aid of others in peril. It is also evident that the solution which the utilitarian model provided to the questions raised by the Commission in this area is somewhat problematic. Difficulties in applying the duty to specific fact situations arise from the fact that the utility-base of the duty renders it imprecise. Causation problems also arise from the fact that the existence of a duty in a given fact situation is dependent upon the potential rescuer's subjective assessment of future consequences and numerous other "imponderables". Further, the imposition of such a duty constitutes a significant intrusion on the liberty of individuals and effectively subordinates individual interests to those of the majority. In sum, although Bentham's utility model provides a useful framework within which to begin the exercise of reforming the criminal law, the shortcomings of the model discussed in the preceding chapters illustrate that the model fails to provide adequate guidance to modern law reformers and, in some cases, raises more questions than it is capable of providing answers for.

CHAPTER NINE: CAN UTILITY THEORY EVER FORM AN
APPROPRIATE BASIS FOR LAW REFORM?

The preceding chapters have explored the foundations of utilitarianism, the deficiencies of utility theory and a number of instances in which utilitarianism has been looked to for guidance by the Law Reform Commission of Canada. The specific issues of the proper scope of the criminal law, obscenity, hate propaganda, the defence of necessity and the duty to rescue have been used to illustrate how the Law Reform Commission of Canada has endeavoured to utilize a utilitarian perspective in its examination of existing laws and the formulation of proposals for the reform of such laws by beginning the law reform exercise with an examination of the underlying utility of the available options. These five illustrative cases, for varying reasons, support the general premise that utility theory, relied upon in a vacuum, fails to provide an appropriate model for criminal law reform in modern Canadian society and clashes with the thrust of the Charter of Rights.

The object of this chapter is to take the discussion one step further and to address the question of whether utilitarianism can ever form an appropriate basis for law reform in the criminal law sphere. The answer to this

question, it is submitted, is that Benthamite utilitarianism can provide a suitable framework within which to criticize existing laws and formulate proposals for reform only in two limited situations: (a) where a consideration of all other factors relevant to the dilemma facing the law reformer are equal and the assessment of such other factors provides no clear answer to the question of whether the law reform measure in question should be implemented or rejected; and (b) in the context of purely regulatory offences, provided in both cases that there are no negative constitutional implications.

(a) When All Other Factors are Equal

The propriety of the application of utilitarian philosophy in the limited circumstances when all other factors are equal was conceded by Nicholas Rescher in Distributive Justice, his "constructive critique of the utilitarian theory of distribution".³⁴¹ Several of the specific deficiencies of utility theory perceived by Rescher have been discussed previously.³⁴² Basically, Rescher considers the principle of utility to be overly imprecise and too inadequate to serve any

³⁴¹ Supra note 2.

³⁴² See infra, chapter two.

truly useful evaluative function.³⁴³ To Rescher, other factors such as justice, morality and fairness must be regarded as threshold questions which impose severe limits on the utility equation. However, utility theory may play a useful role in those cases where factors such as those enumerated by Rescher or an assessment of the impact on the rights of the individual fail to tip the scales in any one clear direction. In Rescher's words, the greatest good for the greatest number exhibits "a trait that can provisionally be regarded as a point of merit, in the absence of further and very possible countervailing considerations."³⁴⁴

It must be recognized that the circumstances in which all relevant factors weigh equally must by nature arise only on the rarest of occasions. There is, however, one example to be found in the recent work of the Law Reform Commission where Bentham's principle of utility was resorted to because a consideration of other relevant factors failed to produce a clear answer to the law reformer's dilemma. This example was invoked in seeking an answer to the question of whether the criminal law should recognize a general crime of endangerment which would apply in cases where the life or safety of another was placed in jeopardy by the accused's conduct but no actual harm was caused to the victim.

343 Rescher, supra note 2, at p. 8.

344 Ibid., at p.121.

Whether the crime of endangering should be incorporated into the Criminal Code was first addressed by the Commission in Working Paper #46, Omissions, Negligence and Endangering.³⁴⁵ In that Paper, the Commission posed the following question:

"Suppose D recklessly imperils V but: does not injure him so as to commit the crime of causing bodily harm; does not intend to injure him so as to commit some crime of attempt; and does not commit some specific offence such as dangerous driving, careless use of firearms or endangering the safety of an aircraft. Suppose he is merely an extremely reckless cyclist, skater or skier hurtling along with wanton disregard for others who miraculously escape injury. Under present law he has no criminal liability. But should he? Should there be a crime of reckless endangerment?"³⁴⁶

In addressing this question, the Commission looked at a number of factors. First, the Commission took into account the general reluctance of the common law to impose criminal liability in cases where no actual damage has been caused and questioned whether the introduction of such a broadly based offence "would unduly extend the ambit of the criminal law beyond what really warrants its concern, namely, real harmfulness."³⁴⁷ On the other side of this issue, the Commission questioned the soundness of the logic underlying the

³⁴⁵ Supra note 317.

³⁴⁶ Ibid., at p. 31.

³⁴⁷ Ibid., at p.36.

rationale for imposing liability only where harm is caused to the victim. Should the endangerer's culpability be determined by the fact that the victim fortuitously escaped injury? The Commission also noted that "harm" may take more than one form. In this context, the Commission explained that Bentham recognized that crimes cause two kinds of harm - actual harm in the form of death, injury or loss of property and harm in the form of community alarm.³⁴⁸

The second consideration to be taken into account in deciding whether to recommend the introduction of a general crime of endangerment was the lack of certainty inherent in deciding in a given case whether an accused's conduct actually placed the victim in danger. How can causation be established if no harm is caused? The counter-argument to this point is that the criminal law already imposes liability in a number of different contexts where no actual harm can be said to flow from the accused's conduct. This is true in the case of inchoate offences (e.g., where a crime is attempted but not completed) as well as in the context of a number of specific crimes of endangerment (e.g., dangerous driving,³⁴⁹ pointing a firearm³⁵⁰ and the like).

³⁴⁸ Ibid., at p. 31.

³⁴⁹ Criminal Code, s. 249(1).

³⁵⁰ Criminal Code, s. 86(1).

Third, the Commission looked at the question of values and recognized that the proper function of the criminal law is to "denounce attacks on basic values"³⁵¹ and that traditionally the criminal law had not seen fit to punish abstract recklessness - "behaviour which in fact creates no actual harm, but merely a risk of harm often to the agent himself."³⁵² On the flip side, the Commission submitted that disregard for another's safety should be considered a violation of fundamental values and reiterated that culpability should not be premised on whether the victim is lucky enough to escape harm.

It is evident from the preceding paragraphs that the Commission's consideration of principles such as certainty and fundamental values failed to provide a clear answer to the question of whether endangerment should be a general offence. For every argument in favour of the recognition of such a new offence there was an equally compelling counter-argument. Having found no clear answer to the question before it, the Commission concluded that personal safety was a value deserving the protection of the criminal law and looked to Bentham's principle of utility for a means to justify its recommendation that endangerment be a crime.

³⁵¹ Working Paper #46, supra note 317, at p. 36

³⁵² Ibid.

The utilitarian considerations offered in support of this new crime were twofold. First, the introduction of a crime of endangerment would "facilitate early intervention by authority and hence facilitate prevention of actual harm occurring."³⁵³ The second utilitarian justification is buried in the first part of the Paper but is reflected in the Commission's comments with respect to the need to protect the value set on public safety. To the Commission, punishing carelessness may "teach offenders to take more care in future, prevent carelessness and publicly affirm the value set on carefulness."³⁵⁴ In sum, the benefits which would flow from the recognition of a new crime of endangerment would, in utilitarian terms, outweigh any of the hardships which might result from the extension of the ambit of the criminal law in the manner recommended. Resort by the Commission to utility theory in the context of its deliberations on the crime of endangerment is, it is submitted, an example of a situation in which utilitarianism was capable of providing a useful and appropriate yardstick against which to measure the desirability of each of the available alternatives.

353 Ibid., at p. 37.

354 Ibid., at p.23.

(b) Regulatory Offences

A regulatory offence is a prohibition against a form of conduct which is not considered truly criminal either because the conduct does not cause serious harm to others or because it does not violate commonly held fundamental values.³⁵⁵ In Our Criminal Law,³⁵⁶ the Commission discussed the nature of the difference between "real" crimes and regulatory offences and concluded as follows:

"Wrongfulness is a necessary, not a sufficient condition of criminality. Before an act should count as a crime, three further conditions must be fulfilled. First, it must cause harm - to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law. These conditions would confine the criminal law to crimes of violence, dishonesty and other offences traditionally in the centre of the stage. Any other offences, not really wrong but penally prohibited because this is the most convenient way of dealing with them, must stay outside the Criminal Code and qualify merely as quasi-crimes or violations."³⁵⁷

The Commission went on to point out that the majority of offences included in the present Code are not truly "wrong in themselves" but have to do with matters such as commerce and

355 Our Criminal Law, supra note 187, at p. 28.

356 Ibid.

357 Ibid., at p. 28.

trade - matters which must be regulated in order for society to function but which are included in the Code for reasons of simple expediency.³⁵⁸ The criminal law must focus on seriously wrongful acts and, to the Commission, care should be taken to avoid "diluting criminal law's basic message by jumbling together wrongful acts and acts merely prohibited for convenience."³⁵⁹

Having drawn this distinction between "real" crimes and regulatory offences, the Commission recommended that the Criminal Code be "pruned" so as to contain only "real" crimes and that no offence outside the Code should be punishable by the imposition of a term of imprisonment. In order to constitute a "real" crime, the conduct in question must meet a tripartite criminality test discussed in the preceding chapter. However, in order to qualify as a regulatory offence the Commission suggested that the conduct should satisfy the following criteria:

- (1) - the conduct should represent a source of potential harm to the community;³⁶⁰
- (2) - the prohibition should not itself contravene basic values regarding what an individual should

³⁵⁸ Ibid., at p. 11.

³⁵⁹ Ibid.

³⁶⁰ The harm in question need not be serious or physical but it must have some general deleterious effect on the community.

be free to do;

- (3) - enforcing the regulatory prohibition must not do more harm than good; and
- (4) - the regulatory prohibition must make a significant contribution in dealing with the problem.³⁶¹

According to this four-fold test, the threshold for assessing liability is somewhat lower than the corresponding test for "real" crimes. The most significant difference between the tests proposed by the Commission for deciding whether conduct should qualify as a "real" crime or be prohibited under some regulatory scheme is that in the latter case the conduct need not constitute a contravention of society's fundamental values. On closer examination it appears that the criteria selected by the Commission are utility-oriented and mirror almost exactly Bentham's utilitarian criteria for assessing whether conduct merits punishment. As noted earlier,³⁶² Bentham expressed the view in his writings that punishment should not be imposed where:

- (1) - no harm has been caused to anybody by the act in question;³⁶³
- (2) - the harm caused by the imposition of the

³⁶¹ Our Criminal Law, supra note 187, at p. 34.

³⁶² See chapter four.

³⁶³ In Bentham's words, "[w]here there has never been any mischief: where no mischief has been produced to anybody by the act in question." Introduction, supra note 9, at p. 159.

punishment outweighs the harm caused by the conduct;364

- (3) - the conduct can be effectively restrained by some other less expensive means.365

Criteria (1) and (2) of the Commission's test coincide in an obvious manner with Bentham's propositions numbered (1) and (2) above. Similarly, criteria (3) and (4) of the Commission's test can be telescoped to form the equivalent of proposition (3) above. Both tests express the same underlying premise in slightly different words - that punishment must be justified on the basis that the harm caused by the conduct must outweigh the cost and hardship to society caused by having and enforcing the prohibition in question.

The approach formulated by the Commission in Our Criminal Law to the ambit of regulatory offences was substantially adopted by the Supreme Court of Canada in the celebrated case of R. v. City of Sault Ste. Marie,366. In that case, the Court

364 As Bentham explains, punishment is unprofitable where "on the one hand, the nature of the offence, on the other hand, that of the punishment, are, in the ordinary state of things, such, that, when compared together, the evil of the latter will turn out to be greater than that of the former." Ibid., at p. 163.

365 To Bentham, the imposition of criminal punishment would be unwarranted where "the purpose of putting an end to the practice may be attained as effectually at a cheaper rate." Ibid., at p. 164. Frugality as a desirable end of punishment is also discussed at some length in Chapter XIV.

366 [1978] 2 S.C.R. 1299.

drew a distinction between crimes and public welfare offences and established three categories of offences differentiated by reference to the mental element required - (1) real crimes requiring proof of mens rea; (2) public welfare or strict liability offences for which no mens rea need be proved and for which the defence of due diligence would apply; and (3) absolute liability offences requiring only proof that the accused committed the act in question.

Viewed against this backdrop, utilitarian methodology, it is submitted, though inappropriate for assessing whether conduct should qualify as a "real" crime may be entirely appropriate for application in the regulatory sphere. The reasons why this lower threshold based primarily on utilitarian considerations may be appropriate for regulatory offences have been alluded to above and flow primarily from the differences in nature between regulatory offences and "real" crimes. First, the punishments available for regulatory offences are considerably less severe than for other crimes. Indeed, if the Commission's recommendation were adopted, imprisonment would not be an available form of punishment for regulatory offences. Second, the stigma considered to flow from a conviction for a regulatory offence would also be proportionately lower than a conviction for a "real" crime, largely due to the fact that society considers the nature of the conduct prohibited in the regulatory sphere to be relatively less objectionable than

"real crimes". In this context, utility theory may well be capable of providing the public policy maker with a useful evaluative tool.

CONCLUSION

The preceding chapters have explored in some detail the philosophical underpinnings of Jeremy Bentham's principle of utility and the deficiencies which have been exposed in the academic literature of the utilitarian methodology. The degree to which the Law Reform Commission of Canada has attempted to embrace the utilitarian model as a starting point in the law reform exercise in reviewing the issues of the proper scope of the criminal law, obscenity, hate propaganda, the defence of necessity and the recognition of a duty to rescue has also been addressed in order to substantiate the thesis of this Paper - namely that utilitarianism represents an inappropriate model for law reform, particularly in the context of the environment created by the enactment of the Canadian Charter of Rights.

The contention that utilitarian theory is an inappropriate model for substantive criminal law reform is supported by the Charter's commitment to the unwavering protection of the rights of individuals and to the general subordination of all laws and government actions to this objective. The Charter's dedication to the pursuit of the protection of individuals is fundamentally opposed to the majoritarian focus of the utility model on the pursuit of the greater good. By necessary implication, the pursuit of the greatest good for the greatest number entails a subordination of the interests of individuals to those of the

collective community, an approach which clashes head on with the role of the Charter.

The examination in chapters four through eight of the various law reform proposals which reflect utilitarian underpinnings serves to illustrate that: (1) in cases where the Commission has adhered to relatively pure utilitarian theory the recommendations derived from the application of this theory exhibit many of the deficiencies discussed in chapter two; and (2) even in cases where the Commission has endeavoured to apply the utility model it has often found it necessary to depart from this model or to modify the model by taking into account non-utilitarian considerations in order to arrive at a recommendation that is in line with the realities of contemporary Canadian society.

Notwithstanding the general inapplicability of pure utilitarian theory and its limitations in the modern social context, there are two confined fact situations in which, it is submitted, the utility model is capable of providing the law reformer or public policy maker with valuable guidance: (1) where all relevant factors are equal; and (2) in the context of regulatory offences, provided in each case that there are no negative constitutional implications. In these limited circumstances, it is submitted that Bentham's utility quotient can serve as a useful evaluative tool in critically examining existing laws and generating proposals for reform.

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